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COURT-BASED MEDIATION FOR CIVIL
CASES: AN EVALUATION OF THE
ONTARIO COURT (GENERAL DIVISION)
ADR CENTRE.

BY: JULIE MACFARLANE

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**COURT-BASED MEDIATION FOR CIVIL CASES:
AN EVALUATION OF THE ONTARIO COURT
(GENERAL DIVISION) ADR CENTRE**

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November 1995



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ACKNOWLEDGEMENTS AND THANKS

I would like first to acknowledge the contribution of my colleague, Lisa Feld, of Stitt Feld Handy & Houston, who assisted in the design of this evaluation and gave valuable input throughout the fieldwork period.

Research Associates were Trevor Richards, Irfan Syed, Patricia O'Reilly, and Christine Brown. They each played a major role in the collection and analysis of data and their hard work and dedication is reflected in the breadth and depth of the information offered by the Report.

I would also like to thank the administrative staff at the ADR Centre, who provided me with an initial orientation and courteous accommodation throughout the evaluation period.

Susan Rotondi-Yousef and others at the Faculty of Law, University of Windsor provided secretarial support.

Finally, thanks to Catherine and Ian for their hospitality throughout the fieldwork period.

I would welcome comments and feedback on this Report and can be reached at the Faculty of Law, University of Windsor. However, between December 1995 and May 1996 I will be visiting at the Centre for Legal Studies, University of Sussex, Falmer, Brighton BN1 9QN, England, and can be contacted there.

Julie Macfarlane
Windsor, November 1995

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PART ONE

EVALUATION RESULTS

1. BACKGROUND TO THE PILOT PROGRAMME

The primary objective of the ADR Centre pilot is described in the original Practice Direction (1994) 16 O.R. (3d) 481) as

'enhanced, more timely and cost-effective access to justice for both defendants and plaintiffs. It is designed to provide additional court services and significantly improved access to justice.'

The ADR Centre initiative reflects a desire to improve access to, and participation in, dispute resolution, by providing an informal and non-adversarial forum in which to work towards settlement. Related to this is a wish to enhance the quality of the solutions found, by promoting consensual decision-making and a more varied and flexible range of results than courts are able to offer. In addition, the work of the Centre is aimed at improving the flow of cases through the civil justice system. Offering the parties the opportunity of an enhanced range of settlement mechanisms may reduce the volume of cases which proceed to trial, and may ultimately offer a more economical model of dispute resolution both for the parties and for the justice system itself.

A new Practice Direction ((1995) 24 O.R. (3d) 161) which came into effect September 1995 and sets out some new forms (principally a 'Memorandum to Parties') and additional procedures for the ADR Centre.

Cases are referred to the ADR Centre from General Division filings at University Avenue, Toronto at a rate of four in every ten cases¹. Certain categories of cases - applications, family matters, motor vehicle claims, construction liens - are excluded from the referral pool. Referral to the Centre from the remaining pool is random. Matters are referred once the first statement of defence has been received and are generally assigned a date for a mediation meeting within the next 2-3 months. A much smaller number of individual cases are referred at the request of either the parties or a judge².

At the ADR Centre a staff of four dispute resolution officers (two full-time and two part-time), plus the Project Director, offers parties and counsel a mediation scheduled for an initial two hour period. The Centre is able in some cases to call on a judge for a neutral evaluation of the legal issues; and to extend the time spent on the mediation, or schedule a follow-up session.

2. SOURCES AND PRESENTATION OF DATA

Three primary data sources were used for the evaluation. The results that follow are drawn from these three sources. Some of the results, and the conclusions drawn from them, are supported by more than one source.

A. *questionnaire surveys completed by ADR Centre users (lawyers and clients)*

The questionnaire survey forms are attached at Appendix C.

437 completed questionnaire surveys were received from lawyers who had attended at the ADR Centre, and 268 from clients. Of the 704 surveys, 32% related to actions for breach of contract or negligence, and 22.8% involved wrongful dismissal claims³.

191 of the lawyers responding to the survey represented plaintiffs, 232 represented defendants and the remainder acted for third parties.

Approximately half the cases reported on by lawyers or clients in completed surveys were settled at the Centre. This corresponds to the overall settlement rate for cases that come to an ADR session at the Centre⁴.

Data from this source is described throughout this Report as 'questionnaire survey' or 'survey' data. It is presented as either frequencies (a percentage of the respondent group) or, where this is statistically significant, as cross-tabulations between two question sets. In both cases this data is accurate to a 95% level of confidence, that is, nineteen times out of twenty and to a maximum 5% margin of error.

B. *personal interviews with a case study group from the ADR Centre and a control group outside the Centre*

Beginning with 30 cases selected from the pool of ADR cases and 30 from the remainder of the General Division, a total of 143 personal interviews were conducted with counsel and clients⁵.

Of this group, 66 were plaintiff parties or lawyers and 61 defendants.

61 lawyers in the (General Division) control group and 51 lawyers in the experimental (ADR) group were interviewed. The client interview groups were smaller but still acceptable in qualitative methods research (12 clients in the control group and 19 in the experimental group⁶).

Half of the cases in the experimental (ADR) group sample did not settle either in full or in part at the Centre while the other half reached settlement on all issues. This corresponds to the overall settlement rate at the Centre at the time the case study sample was drawn (May 1995)⁷.

The interview formats are attached at Appendix D.

Data from this source is described throughout this Report as 'interview data' or where relevant 'ADR (experimental) interview group data' or 'control group interview data'. It is presented as frequencies (as percentages of the respondent group). Verbatim comments made by interviewees are included to illustrate particular points.

C. analysis of data held on the General Division's Sustain database

Data on cases referred to the ADR Centre from 1 January - 30 September 1995 was provided by Julia Niziol⁸. This data (presented at 3A(i) below) shows overall settlement and disposition patterns, case type breakdown and timelines to disposition for all cases referred to the Centre during this ten month period.

In addition, the evaluation drew a sample of 1460 cases which had been referred to ADR and disposed of during the nine months 1 January - 30 August 1995. A matched control group of the same size was drawn from the remainder of the General Division (including 10% case management cases)⁹. This was used to compare settlement and disposition patterns between the ADR group, the General Division group and the Case Management group.

Data from this source is described throughout this Report as 'Sustain data', since it was extracted from the Court Administration's Sustain database.

The experience of the evaluation team in dealing with data available on Sustain necessitates the following caveat. While the Sustain data entered and held on ADR Centre cases appears to be regularly up-dated, accurate and faithful to the coding system developed for ADR cases, this does not appear to be the case with Sustain data for the remainder of the General Division. Within the General Division database there appear to be significant inaccuracies (for example, cases recorded as having been disposed of in a negative number of days) and also some inconsistencies in the way in which the highly complex coding system is used and entered. While Sustain data described below as being from the 'control' group can be relied upon for the purposes of establishing patterns and trends, there are some concerns about its absolute numeric reliability.

D. presentation of data

The data described and analyzed throughout this report draws on the three above sources and is presented in three alternative forms: data frequencies (that is, percentages of the particular respondent group); cross-tabulations (that is, where the combination of responses to two questions produce a statistically significant result to a 95% confidence level); and verbatim quotations from comments made in interviews.

3. WHAT IMPACT, IF ANY, HAS THE ADR CENTRE HAD ON SETTLEMENT PATTERNS?

A. *settlement and disposition patterns in the experimental (ADR) group*

i. *case disposition figures (including cases settled at ADR)*

The following three tables are based on *all* cases referred to the ADR Centre from 1 January to 30 September 1995 and disposed of by this date.

TABLE ONE

Breakdown of case disposition : all ADR cases

opted out	33 % (337 cases)
settled before ADR	15 % (167 cases)
settled or partially settled at ADR	29 % (302 cases)
not settled	23 % (253 cases)

Of cases that were disposed of during this period, roughly half actually attended a session at the Centre (555 cases out of 1084) and of these a slim majority (54 %) settled in full or in part. This matches the settlement rate among those cases reported on in the questionnaire survey and in the sample drawn for the case studies.

Case type breakdown for the purposes of the evaluation is limited to three major categories ie those classified as breach of contract/negligence; wrongful dismissal; and a third group of all 'other' cases (primarily real property, construction liens and professional malpractice suits).

For the period 1 January to 30 September, the breakdown of case type is as follows.

TABLE TWO

Breakdown of case type: all ADR cases

<i>case type</i>	<i>% caseload</i>
breach of contract/negligence	30%
wrongful dismissal	17%
other	53%

Relating these case types to disposition, the patterns are as follows:

TABLE THREE

Breakdown of case type to disposition : all ADR cases

<i>case type</i>	<i>% settled</i>	<i>% opt out</i>	<i>% SBADR*</i>	<i>%not settled</i>
breach of contract/ negligence	21%	35%	13%	31%
wrongful dismissal	36%	15%	16%	33%
other	24%	36%	17%	23%

** settled before ADR*

The next three tables are based on a sample of 1460 cases referred to the ADR Centre from 1 January to 30 August 1995 and disposed of by this date. This sample of 1460 ADR cases was used to build the control group from the General Division. This sample group of 1460 ADR cases shows a very similar pattern to the total January - September caseload, which serves to support these trends, and assure that the sample is authentically representative of the whole.

TABLE FOUR

Breakdown of case disposition: ADR sample group

opted out	34 % (138 cases)
settled before ADR	17 % (69 cases)
settled at ADR*	25 % (104 cases)
not settled**	24 % (99 cases)

* *does not include partly settled at ADR*

** *includes partly settled at ADR*

Taking account of some slight differences in the categorisation of the figures (above), these figures reflect the patterns of the larger group in Table One.

For the sample group, the breakdown of case type and case type to disposition is as follows.

TABLE FIVE

Breakdown of case type: ADR sample group

<i>case type</i>	<i>% caseload</i>
breach of contract/negligence	29 %
wrongful dismissal	17 %
other	54 %

TABLE SIX

Breakdown of case type to disposition : ADR sample group

<i>case type</i>	<i>% settled</i>	<i>% opt out</i>	<i>% SBADR*</i>	<i>%not settled</i>
breach of contract/ negligence	21%	40%	17%	22%
wrongful dismissal	36%	15%	15%	34%
other	24%	37%	17%	22%

* *settled before ADR*

Tables Three and Six together confirm that wrongful dismissal cases have the highest settlement rate at the Centre, and the lowest rate of opt out. Some lawyers suggested in interviews that one explanation for the higher rate of settlement for wrongful dismissal cases may be that the law in this area is regarded as relatively settled, with clear guidelines for quantifying damages once liability is agreed. Another possibility suggested in interviews is that the higher rate of referral for wrongful dismissal cases (every other wrongful dismissal suit case is referred to the Centre compared with four out of ten other cases in the pool¹⁰) is expediting the expertise of the wrongful dismissal Bar in making effective use of the mediation at the Centre.

The sample group of 1460 ADR cases was further analyzed to determine mean and median timelines to disposition for cases that settled at the ADR Centre. Table Seven shows mean and median timelines to disposition.

TABLE SEVEN

Timelines to disposition by case type: ADR sample group (cases that settled)

<i>case type</i>	<i>mean</i>	<i>median</i>
br of contract/ negligence	129 days	126 days
wrongful dismissal	125 days	122 days
other	124 days	124 days

Table Seven shows timelines to settlement for all case types at slightly more than 120 days with no significant variation.

Analysis of Sustain records of cases reported on in the questionnaire survey revealed that where cases settled at the Centre, they did so in a median time period of 196 days from the filing of the statement of claim¹¹. This longer period is probably accounted for by the fact that more of the cases reported on in the questionnaire surveys were cases which attended at the Centre in August and September 1995, when the wait time to a first scheduled mediation session had lengthened (to around 12-14 weeks from 6-8 weeks in the earlier part of the year).

Both sets of figures accord with the length of time in days anticipated to complete a case to the point of statement of defence where time periods are specified. For example, for standard track case management cases filing of a statement of defence is expected to be completed after 120 days. Obviously some additional time is required for a case to be scheduled at the Centre. The mean timeline to disposition is also affected by the frequency of first date adjournments at the Centre requiring rescheduling of the mediation meeting to a later date¹².

These figures may be compared with the disposition length for settled cases in the control group sample, below at 3B(i).

ii. cases settled before ADR

One group of cases that seemed important to examine more closely were those that settled before the scheduled ADR session could take place (see Table One, above). In this case the parties notify the Centre accordingly and their ADR session is cancelled. These cases represent around 15% of the total referrals to the Centre.

A recent study of court-annexed mediation in North Carolina¹³ suggested that referral to ADR had a significant impact on settlement behaviours short of participation in an ADR session. This study suggested that referral to ADR could sometimes act as a catalyst to settlement. In order to examine this hypothesis, 50 cases were selected at random in which the Centre had been informed that the parties had settled in advance. In each case the lawyers were contacted and asked to respond to the following question:

"In your view, did the referral to ADR have any impact on settlement being reached in this case?"

Only thirteen responses were received. Of these, six said that referral had a definite impact on the settlement process. A common theme in these responses was that ADR promoted settlement because information became ready earlier as both sides prepared to mediate. This resulted in the clarification of the strengths and weaknesses of each side's case. For example,

"We settled for a proper amount because I think the plaintiff's solicitor was reluctant to go through ADR[when] the position that the client was taking was embarrassing and unreasonable. There's no question that the ADR notice resulted in the settlement of the case. If we had not been referred, we would have proceeded with examination for discovery, and a pre-trial conference before the case would have settled."

Another comment made by several respondents was that where the sides were already close to settlement, referral to the Centre acted as an incentive to resolve the matter before committing to the time and expense of ADR.

In the other seven cases, the lawyers responded that referral to the Centre had no bearing whatsoever on the settlement of the case.

iii. settled since ADR

Lawyers and clients in the ADR interview group were asked if they had settled any of the outstanding issues since mediation, and what, if any, impact did mediation have on the settlement. 84% of the lawyers and 81.8% of the clients replied they had not settled any of the outstanding issues since the mediation. In the minority of cases where settlement had occurred since mediation, 50% of the lawyers replied that mediation had 'definitely' contributed to settlement, and 50% of clients replied that mediation had 'possibly', contributed to settlement.

iv. settled at what point?

Cases are referred to the ADR Centre after the filing of the first statement of defence. It seems safe to assume therefore that at least the majority of cases that settle at the ADR Centre do so either just before or just after close of pleadings. Since October 1995 the wait time on scheduling the first ADR session has become extended to 16 weeks. As a consequence a small number of these later cases *may* be coming to ADR after discovery. However all the cases examined for the evaluation appear to have come to the Centre before discovery took place.

B. settlement and disposition patterns in the control group

i. case disposition figures

The following analysis is based on a sample of 1460 cases filed and disposed of in the General Division between 1 January 1991 and 30 August 1995¹⁴. 10% of the sample are Case Management cases¹⁵. This sample was matched for case type distribution to the original sample of 1460 cases taken from the ADR Centre stream between 1 January and 30 August 1995 (see above, 3A(i)). Where relevant, comparison figures for the same-size ADR group are in brackets in the tables that follow. This control group data may also be compared with the overall settlement and disposition patterns for the ADR Centre described at 3A(i) above.

Table Eight gives mean and median timelines to disposition for *all* cases in the General Division control group, whether settled before trial or tried. Table Nine gives mean and median timelines to disposition for cases in the control group, excluding those that Sustain recorded as having gone to trial (ie only those that settled). For this group comparison figures from the same-size ADR group (disposition in days for cases that settled) are provided.

TABLE EIGHT

Timelines to disposition by case type: General Division control group (all cases)

<i>case type</i>	<i>mean</i>	<i>median</i>
br of contract/ negligence	290 days	236 days
wrongful dismissal	454 days	466 days
other	325 days	313 days

TABLE NINE

Timelines to disposition by case type: General Division control group (cases that settled)

<i>case type</i>	<i>mean</i>	<i>control median</i>	<i>mean</i>	<i>ADR median</i>
breach of contract/ negligence	288	201	129	126
wrongful dismissal	404	365	125	122
other	203	92	124	124

This table clearly shows significant differences in time lengths to settlement between ADR and General Division cases in each of the three major case type categories. This difference would likely be greater still if cases that did not proceed beyond the filing of the statement of claim were removed from the General Division control group¹⁶. Since such cases would be recorded as settled or disposed of in relatively short periods, they would bring down the mean timeline in the control group. This group is automatically excluded from the experimental group, since referral to the ADR Centre only takes place *after* filing of the first defence cases which have not proceeded to the stage of the filing of the first statement of defence.

The same analysis was carried out for a control group of Case Management cases. Table Ten gives mean and median timelines to disposition for all cases in the Case Management section

(10%) of the control group, whether settled before trial or tried. Table Eleven gives mean and median timelines to disposition for Case Management cases, excluding those that went to trial (ie only those that settled). For this group comparison figures from the same-size ADR group (disposition in days for cases that settled) are provided.

TABLE TEN

Timelines to disposition by case type: Case Management control group (all cases)

<i>case type</i>	<i>mean</i>	<i>median</i>
breach of contract/negligence	213 days	158 days
wrongful dismissal	322 days	294 days
other	209 days	99 days

TABLE ELEVEN

Timelines to disposition by case type: Case Management control group (cases that settled)

<i>case type</i>	<i>mean</i>	<i>control median</i>	<i>mean</i>	<i>ADR median</i>
breach of contract/negligence	272	216	129	126
wrongful dismissal	298	248	125	122
other	214	137	124	124

Once again, there are significant differences in time lengths to settlement between ADR and Case Management cases, in each of the three major case type categories¹⁷. The gap between the ADR and Case Management streams is slightly less in two of the three categories (wrongful dismissal and breach of contract/negligence cases) than for the remainder of the General Division cases (above, Table Nine). Again, the difference between ADR cases and the comparison Case Management group seems likely to have been greater still if cases in which action was not joined (ie those that did not proceed beyond the filing of the statement of claim) were removed from the Case Management control group.

ii. *settled at what point?*

Data provided by the Courts' Administration Division at the Ministry of the Attorney-General shows numbers of cases disposed of at each stage of the litigation process¹⁸. This data should be treated with some caution due to the large number of cases on which the court does not have up-to-date information, that is, those cases in which there has been no action for a considerable period of time, and which may or may not have settled (but the Court has no record). This problem is less acute for data provided on the Case Management stream since parties are required to report on progress.

Only 6.4% of the total cases originally filed in the General Division¹⁹ (and 10.2% of cases in the Case Management stream²⁰) reach trial. A majority of cases settle or are simply withdrawn before service of a statement of defence. This is the case for 75.8% of all actions commenced in the General Division and 58.9% of all actions in the Case Management stream.

Of the total cases originally assigned to the Case Management stream, 5.3% settle (or withdraw) between the filing of the statement of defence and discovery (the point at which referral to the ADR Centre currently takes place); 15.6% settle after discovery; and 10% at or after a pre-trial hearing.

If cases settled or withdrawn before action is joined are *excluded*, 13% of the remaining Case Management cases settle (or withdraw) between the filing of a statement of defence and discovery; 38% after discovery; and 24% at or after a pre-trial hearing.

Outside the Case Management stream, figures are not kept for cases that withdraw or settle following discovery. There is a bulge, therefore, in the number of cases that appear to settle after a statement of defence is filed but before pre-trial. 15% of the total number of cases filed report settlement (or withdrawal) after filing of the statement of defence and before a pre-trial; and 2.8% at or after a pre-trial hearing. If, as above, cases in which action is not joined are removed from the calculation, 62% of the remaining cases filed report settlement or withdrawal between filing the statement of defence and a pre-trial, and 11.5% at or after pre-trial.

If these figures are considered alongside the data compiled above at (i) on timelines to disposition, the following observations can be made:

- a. settlement and withdrawal slows down dramatically once action has been joined;
- b. in the Case Management stream, only a small number of cases (5.3% of the total cases filed and 13% of cases remaining after service of a statement of defence) are being settled between filing of the statement of defence and discovery. This is the point at which the ADR Centre is presently taking cases and achieving an approximately 50% settlement rate for cases that attend at the Centre²¹.

- c. earlier data indicated that General Division cases that settled before trial do so in an average of 200 or more days (see Table Nine above). This would suggest that at least some if not many of those General Division cases which settle between the filing of the statement of defence and pre-trial are taking 200 or more days to reach settlement. In the absence of specified time periods, settlement in these cases may be taking longer than is absolutely necessary (and much longer than timelines to settlement for cases referred at this stage to the ADR Centre and settled there).
- d. only a small number of cases in the General Division apparently settle as a result of discovery or following a pre-trial recommendation (discovery figures are not tracked separately).

C. cost implications of settlement at the ADR Centre

The questionnaire survey asked all respondents to evaluate whether they considered that clients received 'value for money' in the litigation process. Lawyers were significantly more likely than their clients to respond positively, with 56.6% of plaintiff lawyers and 54.1% of defendant lawyers answering 'in most cases' to this question. In contrast, this answer was given by 45% of plaintiffs and 40.2% of defendants gave this answer. Almost no lawyers responded 'never' while this answer was given by almost 8% of plaintiffs and 6% of defendants. However, larger numbers of clients than lawyers were prepared to answer 'always' (19.1% of plaintiffs and 12.8% of defendants). For all groups, a slim majority answered either 'always' or 'in most cases'.

The questionnaire directed at lawyers who had used the ADR Centre asked them whether, in their opinion, their case would have settled at a higher cost, a lower cost, or around the same cost if it had not been referred to the Centre. 70.4% replied that it would have terminated at a higher cost.

Cross-tabulation reveals, unsurprisingly, that significantly more lawyers whose cases settled at the Centre replied that their case would otherwise have terminated at a greater cost, than those whose cases did *not* settle at this point. 79% of lawyers whose cases settled replied that the case would otherwise have terminated at a greater cost. A smaller number (51%) but still a majority of lawyers, whose cases did *not* settle at the Centre, responded that the referral would nonetheless result in a saving on final costs. This presumably reflects a view, described further below at 4B, that even an unsuccessful mediation session can clarify and narrow issues in a manner that speeds subsequent settlement²².

When those who responded that referral to the Centre had saved costs were asked to assess the savings to the client. 43.7% estimated savings of between \$1,000 and \$5,000; 29.6% estimated savings of \$5,000 to \$10,000; and 8.5% estimated savings of between \$10,000 and \$15,000. A further 18.2% calculated that coming to the ADR Centre had saved their clients more than \$15,000 in costs.

The same question was asked of lawyers in personal interviews. Of this group, 51% replied that they believed that if their case had not been referred to the Centre, it would have settled only at a higher final cost to the client. 29.4% replied that they thought that referral did not substantially affect the final costs of the case. Of those that replied that referral had saved money in costs, 54% calculated that this was up to \$5,000; 18% calculated this as a saving of up to \$10,000; 7% estimated savings of up to \$50,000; 7% estimated savings of between \$50,000 and \$100,000 and 14% over \$100,000²³.

12.4% of the group surveyed via the questionnaire survey, and 19.6% of the ADR interview group thought that their case would have settled at a lower cost if they had not been referred to the Centre. As might be expected, a majority of these were lawyers involved in cases that did not settle at the Centre. Too small a number of this group gave a monetary estimate for 'how much lower' to make the figure statistically relevant. However this perspective is reflected in the following comment.

"My client was not happy with the bill for the time for the mediation. The process became a problem because it added an extra layer."

Lawyers were also asked in the questionnaire survey to assess *when* they thought their case would have terminated, if it had not been referred to the ADR Centre. Almost half of respondents (45.4%) replied that they believed that the case would not have been settled until at or after a pre-trial. Almost a quarter (23.6%) responded that they believed that their case would have settled after discovery and another quarter responded that their case would have been resolved only at trial (23.1%). It is noteworthy that of those who believed that the case would have otherwise terminated before discovery (7.9%), 80% were defendants' lawyers²⁴.

It is self-evident that proceeding all the way to trial raises client costs. The interviews sought information on the increased costs likely to be incurred if the case in question were taken through to trial. At the time of the interview, 77.1% of lawyers in the ADR group said that they had so far spent up to 50 hours on the file. When asked to estimate their additional hours if the case proceeded to trial, one third estimated a total of 50-100 hours, nearly 20% (19.8%) estimated 100 to 200 hours and 13.1% estimated more than 200 hours.²⁵

In order to make some assessment of savings when a case terminates before trial, it may be helpful to use the costs model developed by the Civil Justice Review²⁶. This is based on the plaintiff's side through a three day trial in the General Division. The initiation of the claim up to and including serving the statement of claim is assessed at 15 hours work. Subsequent work on affidavits, motions, discovery, pre-trial and trial total 140 hours, plus some additional hours for general file handling (calls, letters etc). Based on this estimate, if a case is referred to ADR immediately after filing of a statement of defence, the plaintiff's lawyer would at that point have worked 30 - 45 hours on the case (this fits with the estimate of billable hours to date given by lawyers in the ADR group, above). If the case is settled at this point, there will be savings (even allowing for 3-4 hours preparation for mediation, 2-3 hours billed for attending the Centre, and 3 hours for follow-up) of up to 130 hours.

D. are there any discernable patterns in the types of cases that settle?

Previous research suggests that there may be some relationships between cases that settle and certain case characteristics. For example, the degree of legal and/or factual complexity²⁷; the amount of money at stake²⁸; whether the parties are private individuals or corporations²⁹; whether they have an on-going relationship³⁰; and the area of law may all have a bearing on the likelihood of settlement. Other factors, such as the relationship between the lawyers, may also have an impact but are less useful since they are difficult to control.

The data contained on Sustain for both the control and the experimental (ADR) groups allowed for an analysis of whether there were any statistically significant relationships between cases that settled and case type (area of law); and the monetary value of the case.

This analysis (using the sample of 1460 cases from the ADR Centre and the matched sample of the same size from the General Division) showed that a larger percentage of wrongful dismissal cases settled at the Centre (36%) than cases in the other two case type groups (breach of contract/negligence and 'other'). Furthermore, a significantly larger number of breach of contract/negligence cases (40%) opted out than the other two case types. Opt outs were lowest (15%) among wrongful dismissal cases (see Table Six above).

In the ADR group, there was not a significant difference between the monetary value of the case and the length of time taken to reach settlement. All monetary values have very similar medians. However, cases in the Case Management stream and in the remainder of the General Division appear to take longer to reach disposition, the higher the monetary value (the one exception to this was cases worth up to \$24,999 in the General Division stream which took longer to reach disposition than the next three monetary groups³¹). Otherwise timelines to disposition gradually increase with the value of the case.

Other potential influences on propensity to settle were not available from the data contained in Sustain but were built into interview questions. Both lawyers and clients were asked questions about the issues at stake, and the nature and future of the relationship. However, no statistically significant relationships could be drawn between this data and the case disposition (settled/not settled).

Nonetheless, the interviews do provide a rich source of commentary on the propensity of individual cases to reach settlement. Many of the lawyers who were interviewed in both the control or the experimental group volunteered comments on the types of cases they regarded as suitable for early settlement negotiations or an ADR process.

Many comments were made about case complexity. For example,

"In this case settlement was possible because the fact situation was very straightforward."

"There were few parties and few issues and this made settlement possible."

"ADR is extremely effective in cases of minimum to moderate complexity"

"A perfect single issue dispute lends itself to early settlement."

A number of lawyers pointed out that where one side was not prepared to admit liability, settlement was unlikely at an early stage. For example,

"Mediation is not appropriate where there is a real liability issue"

"Cases cannot be settled where there is a complete denial of obligation to pay on the part of the defendant."

There were different views on how suitable ADR or another effort at early settlement would be in cases where there was a high emotional investment in the outcome by one or both parties. The following two comments are typical of the opposing perspectives articulated.

"ADR is suitable where there is emotion involved, it allows some catharsis for the client."

"Where the case is over a money issue it is possible to settle. But where there are emotional issues also - such as pride - it's much more difficult."

"Where there is a lot of emotion involved, people need their time in court."

Several made the point that early settlement is only possible where the parties are committed to investing time and money in settlement negotiations; for example where there is an on-going relationship involved or where the parties share an extended history. A number of lawyers and clients pointed out that where one side is a corporation (with 'deep pockets') and the other is a private individual, there is little incentive for the corporation to settle early. On the other hand, as one lawyer pointed out,

"Early settlement should be attractive to institutional clients...because they are business people."

The only case type which was consistently given as an example of an area in which early settlement should be the norm were wrongful dismissal cases.

"Wrongful dismissal cases lend themselves to mediation"

"Wrongful dismissal cases should go to ADR early."

It was suggested by some lawyers in interviews that wrongful dismissal cases are well-suited to early ADR because the law in this area is regarded as relatively settled, with clear guidelines for quantifying damages once liability is agreed. In addition, some commented that many

employers would rather settle quickly where liability is accepted to avoid disputes with former employees souring workplace morale.

Otherwise, there were clear differences of opinion over what type of cases were most amenable to early settlement. For example,

"Slip and fall cases are perfect for ADR settlement"

"Personal injury cases should be left out of ADR entirely, except perhaps after discoveries."

"Construction liens, collection actions would benefit from early ADR settlement. People use litigation to 'extend their line of credit' ie delaying payment by continuing litigation."

"I would not take collection cases - for example, mortgage foreclosures - to mediation".

Asked why they thought that settlement was reached in their case, 71% of lawyers in the interview group replied that avoiding/saving costs was an important factor in reaching settlement while 57% replied that the skill of the mediator was key. 89% of clients gave cost savings as a reason for settlement, 78% cited time savings and 67% pointed to a good rapport between the lawyers as a factor in reaching settlement³².

E. a comparison of efforts towards settlement in case studies from the ADR Centre and the General Division 'control' group

One of the reasons for creating a 'control' group for interview case studies was to examine settlement behaviours in cases that were *not* referred to the ADR Centre. The data above (at B) suggests that referral to the ADR Centre

- i. has *shortened* the length of time in which some cases are disposed; and
- ii. has *reduced* the median time period in which General Division cases are disposed; and
- iii. has accordingly *reduced* client costs in these cases (at C).

What is less clear is whether these particular cases would ultimately have settled anyway, albeit later in the process, with or without the intervention of ADR. In other words, how far does the service provided by the ADR Centre qualitatively improve upon the settlement behaviours ordinarily practised by lawyers?

This point was made a number of times by lawyers in the interview group, especially those in the control group. For example,

"The lawyer has to try to resolve the case as soon as possible anyway."

"A lawyer gives his client 'the straight goods' anyway; a mediator would not have helped."

"Banks are trying to collect money owed to them. Clients such as these are going to feel insulted when asked to go to ADR. They will usually have already tried to talk to the other side before taking action."

Data from interviews with lawyers and clients in the control group provides some information on settlement behaviours in cases which were not referred to the ADR Centre.

Asked first about efforts to resolve the dispute in question before counsel was instructed, one third of clients in the control group replied that they had 'never' discussed the issue with the other side. This suggests that earlier neutral intervention might have avoided at least some legal claims.

When asked about efforts to settle the case after the legal action had been commenced, just over half the lawyers (53.6%) indicated there had been more than one informal offer to settle the case and 44.6% indicated there had also been more than one formal offer to settle. 42% of clients replied there had been more than one informal offer to settle and 58% replied that there had been one formal offer to settle.³³ Only 8.9% of lawyers and 8.3% of clients replied that there had been no informal or formal offers to settle.

Lawyers' comments

Some of the comments made by lawyers about the settlement process suggest that 'everything possible' was tried to obtain settlement. Several lawyers said that they advised their clients to settle but their clients would not take that advice. In one case the lawyer blamed his 'client's greed' for the fact that the case did not settle. Others spoke of what they characterised as unrealistic expectations on the part of their clients which made them unwilling to settle³⁴.

In other cases, however, it appeared that too little, too late was done to encourage settlement. For example,

"Just as the trial was starting, everyone realised that the matter should be settled."

"The other side only realised at discovery that they could not prove their claim so they decided to abandon the case at that stage."

Competition between lawyers may also impede settlement in some cases. For example,

"I think that we were close to settling early on, but someone decided to 'get tough' and we ended up going all the way to pre-trial."

"I had a very poor rapport with the other lawyer. He was belligerent from Day One. "

Some of the cases in the control group had settled. Of those lawyers who indicated a settlement had been reached, a majority (64%) said that settlement was reached through an exchange of formal offers to settle, while 38% replied correspondence including informal written offers, and 36% replied telephone discussions.

When asked whether they would have welcomed the opportunity to try mediation in this particular case, a substantial number of lawyers in the control group (41.4%) said that they would have welcomed it. The following comments are indicative of this group's response to this question.

"With mediation we might have got to settlement earlier [because] it would have focused the minds and expectations of the parties"

"Mediation might have worked in this case [because] it would have helped the clients see where their case stands."

"Getting everyone [lawyers and clients from both sides] together in the same room at the same time is a good idea."

"This case probably would have settled in mediation. Bringing both sides together and addressing some of the emotional issues at any early stage - and doing some reality testing for both sides - would have made a big difference in this case."

However another large group (34.5%), said that they would not have been interested in an opportunity to use mediation. Of those giving reasons for their answer, 19.6% said that the nature of the case made it unsuitable for mediation. For example,

" The legal issues were complex here and it was important to know the case well before being able to proceed to settlement. "

"The whole case was dependent on witnesses who were not parties to the action and would not be present at the ADR session. "

"The discovery process was essential in this case. The parties didn't yet know all the facts. "

"Where credibility is an issue you need discoveries. "

14.3% of lawyers in the control group said that the attitude of the other side would have made mediation fruitless. The following are some indicative comments.

"The other side was so stubborn, and mediation depends on the other side being prepared to talk."

"There is no point in spending time or money on ADR unless both parties are committed to try settlement in good faith."

And finally,

"This case would have settled anyway if the parties wanted to. The clients were both experienced insurance companies."

Several lawyers made the point that early settlement would have been more likely if a recommendation had been made by a judge or another person with authority; but that the intervention of a mediator would not have helped. For example,

"We needed someone with the weight of a judge for this case."

"We would have appreciated a strong mediator who would have told the client that there were some weaknesses in his case."

Clients' comments

In control group cases which had settled, clients were asked what procedure was used to reach settlement. 33% of clients stated that the settlement was reached through an exchange of formal offers. Only one interviewee replied that settlement was achieved via face-to-face negotiations and one other said that settlement was reached following a pre-trial recommendation.

Asked why they thought their case settled, only one factor, the weight of legal opinion, was selected by a majority of client respondents (66%). Cost was the second most often cited factor. One client described her reason for settlement as "fear of losing - and not having enough money left to pay my lawyer".

A number of client interviewees commented that they felt that their case could have been resolved earlier if the lawyer had put more into settlement discussions. For example,

"It could have settled earlier if my lawyer was better prepared and more responsive..."

"My lawyer told me about a pilot project using ADR. That sounded better than what we did."

Others spoke of the need for more of a settlement orientation in negotiations between the two sides, for example,

"If the plaintiff had exercised some good old-fashioned common sense [we could have settled earlier]."

"If the other side had been fair and offered something reasonable we could have settled earlier."

"If the company had made a more reasonable offer sooner. They thought if they dragged it out that I would just give up and go away, but I didn't...I guess they got tired of it too."

Many complained about the length of the process and the impact this fact alone had on settlement behaviours. For example,

"They [the other side] seemed to think that if they dragged it out I would just give up and go away, but I didn't."

"The doctrine of 'deep pockets' works against the poor client. This [the other side] was a large firm that can afford large settlements."³⁵

Asked about how they thought the case could have progressed differently in order to maximise the chances of settlement, 30% of clients mentioned mediation or arbitration. When asked whether they would have taken an opportunity to use mediation in their case, 58.3% of clients said they would certainly have taken it and a further 16.7% said that they would probably have taken it. The following are indicative of some of the comments that were made.

"Mediation would have helped because this wasn't just about money. Perhaps I would have been treated more fairly. Perhaps if it had been a bit more informal with more time for discussion [we could have settled]. If we could have discussed the whole picture, perhaps we could have reached a resolution, where we could all walk away with our heads held high. It would have saved a lot of money and we could all have got on with our lives sooner."

"I didn't want to go to court to 'ace' my enemies. I wished then that we could have come to a settlement. Instead I was humiliated in court."

A much smaller number of clients said that they would not have welcomed mediation. This is how one client expressed this.

"We wanted a clear decision. This could only be achieved through the court. If there was any deviation from our position it would have been deleterious to the reputation of the company. There were no grey areas. The issues were black and white. So a mediator would have wasted his or her time."

A number of additional comments made by clients illustrate the toll that litigation can take on personal lives. Yet responses to questions about level of understanding and participation in the litigation process rated very highly. All of the clients in the control group felt they understood everything that was going on in the trial and a large majority responded that they felt 'very much' like a participant (72.7%). Almost two thirds (63.6%) replied that they received enough information from their lawyer about the litigation process to answer all their questions. However, their verbatim comments reveal some frustrations with the litigation system (below).

While 63.6% of clients felt that the litigation process (described in terms of their opportunity to state their case, time periods, client input) was fair, less than 10% (8.5%) described themselves as completely satisfied with the outcome of the case and 41.7% as only partly satisfied. 16.7% were 'not at all satisfied'. The most frequently stated reason for this evaluation was the length of time taken by the process. For example,

"Its taken so long and we're still waiting. Its taken its toll on myself and my family. Nothing could have prepared us for this."

"I'm glad that it's over. It was consuming my life."

F. summary of findings on the impact of the ADR Centre on settlement

1. cases that settle at the ADR Centre do so in a mean of between 124 and 129 days (based on a sample of data from January 1 to August 30 1995). The mean time to case disposition for cases that settle before trial in the remainder of the General Division, and including Case Management cases, is at least twice as long and sometimes even longer. Although a majority (62%) of General Division cases in which a statement of defence is filed settle before a pre-trial hearing, settlement in these cases still takes on average more than 200 days.
2. cases that settle at the ADR Centre always do so after the filing of the first statement of defence and generally before discovery. Almost exactly half the cases that attend at the ADR Centre settle there. Taking figures from the Case Management stream, only 5.3% of the total cases filed (and 13% of cases remaining once action has been joined) settle between filing of the statement of defence and discovery (these figures are not available for the General Division).
3. referral to the ADR Centre may in some cases precipitate settlement before the scheduled ADR session.

4. referral to the ADR Centre is considered by a majority of lawyers to reduce legal costs to the client in cases that both *do and do not* settle there.
5. wrongful dismissal cases are settling at a higher rate than other cases referred to the ADR Centre.
6. higher monetary value generally extends the time to case disposition in the General Division (including Case Management cases). However monetary value does not appear to have any significant impact on disposition timelines for cases that settled at the ADR Centre.
7. finally, referral to the ADR Centre appears to have a significant impact on traditional settlement behaviours including the earlier readiness of the case for settlement negotiations, and the early meeting of counsel and clients 'face-to-face'. There appears to be significant support for this change from more traditional practice from clients.

4. HOW SATISFIED ARE LAWYER USERS WITH THE ADR CENTRE?

A. *respondent demographics*

The majority of lawyers (61 %) in the survey group had been referred to the Centre on more than one occasion. Only 39% of the lawyers in the (experimental) interview group had been referred on more than one file.³⁴

63.4% of the survey lawyers stated that they had previous ADR experience. 77% of (experimental) interview lawyers said that they had had experience with both mediation and arbitration, and 26% with early neutral evaluation. These figures are higher than expected and may reflect respondent's 'knowledge of', rather than 'experience with', ADR processes.

The level of ADR experience was lowest among those who had been in practice between one and five years (23.3% of the respondent group), with only 10% classifying themselves as having had 'extensive' ADR experience and almost 30% saying that they had had no experience at all with ADR. Experience appeared to be highest in the group with six to ten years of practice experience. However more than 20% of this group and almost 20% of those with more than 20 years of practice experience said that this was their first experience with ADR.

The level of experience with court-annexed ADR was highest among the newest members of the Bar, that is, those with one to five years of practice experience.

191 of the lawyers surveyed represented plaintiffs. 232 represented defendants and the remaining 13 represented third parties.

23.3% of the survey lawyers had been in practice for between one and five years. Very similar proportions of the survey group (23.8% and 23.6% respectively) had been in practice for six to ten years, and eleven to fifteen years. 15% had practised for sixteen to twenty years and 14.3% of the sample for more than twenty years.

The results outlined below indicate where, if at all, any of these variables is statistically significant.

B. *what aspects of the Centre's service are lawyer users positive about?*

i. *initial referral*

58% of lawyers in the ADR interview group replied that they welcomed the referral to the ADR Centre while only 16% replied that they did not welcome it (the remainder welcomed it 'with reservations'). Half of those who did not welcome the referral cited the hostile relationship between the parties as the reason. Another concern was that cases which might be unsuitable for ADR were referred at random.

Approximately 60% of the lawyers in the ADR interview group said that they had either a very or a 'somewhat' optimistic attitude towards mediation in advance of the session. However almost a quarter (24.5%) said that they were 'somewhat sceptical' before mediation and almost 15% were 'very sceptical'. There was no significant correlation between the degree of scepticism expressed and previous ADR experience, but this may reflect some tendency to 'over report' previous ADR experience (see above at 4A).

From the outset, a significant divergence between the views of plaintiffs' lawyers and defendants' lawyers is clear from the data. Defendants' lawyers are generally more pessimistic about the potential benefits of mediation (for example 52.6% envisage that mediation may result in a faster settlement compared with 71.7% of plaintiffs' lawyers; 53.9% of defendants' lawyers believe that mediation may save on costs compared with 73.8% of plaintiffs' lawyers). More defendants' lawyers than plaintiffs' lawyers said that they would have preferred to opt out, but the other side would not agree to this (11.6% compared with 3.1%). This may in some cases reflect the concern expressed by some defendants' lawyers who chose to opt out (see 6B, below) that if their client was not prepared to accept liability, there was little purpose in settlement discussions at this stage.

Lawyers for both plaintiffs and defendants expressed some negative attitudes towards the mechanics of the referral process. This is described below at 4B.

Some negative comments had been anticipated over the *timing* of referral to the ADR Centre, which takes place after the filing of the first statement of defence (that is, before close of pleadings in cases involving counter-claims or more than one defendant party). It was expected that counsel in some cases would feel that settlement discussions were premature when they took place before discovery.

However, results suggest that the timing of the referral is not seen as a problem by the majority of lawyers. Survey respondents were asked if they felt that they had adequate opportunity to prepare for settlement discussions given the timing of the referral. 79.6% replied that they did, and only 10% cited more time needed to prepare as a reason for asking for an adjournment. Of the minority of all lawyers who complained that the timing of the referral gave them inadequate time to prepare, defendants' lawyers were proportionally over-represented. Defendants' lawyers comprised 70.5% of those who said that they had inadequate time to prepare.

An even larger majority of the interview group (88.2%) replied that the stage at which this case was referred to the Centre allowed them to adequately prepare for settlement discussion. Nearly 60% of this group explained their answer by saying that either the issues were already clear at the stage at which the case was referred (that is, after filing of the first statement of defence), or that the case was not complex and did not need to proceed to discovery in order for settlement discussions to take place.

A slightly smaller majority of lawyers in the ADR interview group (72.5%) felt the referral made most sense after the delivery of the first statement of defence (that is, when referrals

currently take place). 17.6% said that they would have preferred to have been referred after discoveries were completed.

In comments, two lawyers in the interview group suggested that referral after the close of pleadings might be more appropriate, especially in multi-party actions or where counter-claims were expected but outstanding.

It was also anticipated that there might be some negative comment about the 'opt out' (as opposed to 'opt in') system in place for referrals to the Centre. Several lawyers in the ADR interview group suggested that the opt out protocol should be a unilateral right rather than requiring the agreement of both sides. However, far more lawyers, when asked pointed out that in reality, the procedure amounts to a unilateral opt out since if the other side is unwilling to proceed, successful ADR is unlikely and both sides will choose not to proceed. A few made the further comment that if the process were not based on an opt out system, it would be difficult to persuade people to use ADR at all. For example,

"I have no problem with the process being fairly coercive. It is a waste of taxpayers money for so many cases to go to trial. There is plenty of coercion anyway in the litigation system which we accept, for example rules about cross-examination and so on."

The opt out process in itself, therefore, attracted negative comment from only a small number of lawyers. Furthermore some of these negative comments may be related to the random assignment of cases within the 'pool' to ADR. This suggests that screening out certain cases (for example, multi-party suits) or allowing exceptional cases to refer themselves at a later stage, would probably make an opt out approach more acceptable to its critics.

ii. reducing the costs and timeframe of resolution

Lawyers in the survey group were asked what they saw as the possible advantages of using the ADR Centre in any particular case. A list of possible reasons to proceed with ADR was provided and respondents could add further items if they chose. The lawyer's responses reflect a preoccupation with the mechanics of dispute resolution delivery - that is, speed and cost - rather than with any special characteristics of the process or the outcome.

61% of lawyer respondents cited a faster resolution of the dispute as a reason to proceed with ADR. 62% cited the opportunity to reduce overall costs to their clients as a reason to proceed. Significantly more plaintiffs' lawyers than defendants' lawyers marked these responses.

The questionnaire survey also asked lawyers whether, in their opinion, their case would have settled at a higher, lower, or around the same cost, if it had not been referred to the Centre. 70.4% replied that it would have terminated at a higher cost³⁵.

The same question was put to lawyers in the ADR interview group. Of this group, 51% replied that they believed that if their case had not been referred to the Centre, it would have settled at a higher final cost to the client. 29.4% replied that they thought that referral did not substantially affect the final costs of the case³⁶.

12.4% of the group surveyed via the questionnaire thought that their case would have settled at a lower cost if they had not been referred to the Centre. Of this minority group, it is interesting to note that a clear majority (62.2%) were defendants' lawyers. This might be explained by their receiving instructions not to consider agreeing to any claim against their client at this early stage.

Questionnaire respondents were asked to evaluate the statement 'the mediation process saved my client money in terms of my fees.' 66% of lawyers strongly agreed with this statement and a further 21.3% agreed. Only 7.7% disagreed or strongly disagreed.

iii. the mediation process generally

The responses of lawyer respondents in the survey indicated satisfaction with most dimensions of the process of mediation at the ADR Centre. With only one exception³⁷, questions asked of all lawyers (whether or not their cases settled) about the session they attended at the Centre were answered positively by a majority of lawyers. Furthermore, in only two questions (whether neutral evaluation by a judge would have been helpful and whether mediation revealed facts about the case that assisted in settlement discussions) did the 'strongly disagree' rate rise above 8%. Some negative comments were expressed over the role played by the mediator in some cases, and these are described in some detail below at 4C.

60.9% of the lawyer survey respondents agreed, or strongly agreed, that the problems raised by the case were sufficiently explored in the mediation process.

66.5% of lawyers in the survey group either agreed, or strongly agreed that the outcome, whether positive or negative for their client, had been arrived at fairly. However 25% described themselves as 'neutral' on this question. The interview group was asked, 'was the mediation conducted fairly?' 64% of all lawyers in the ADR interview group (including those who had and had not settled at the Centre) stated that the conduct of the mediation was 'very fair', and a further 32% found it to be 'quite fair'. 72.9% cited 'the skill of the mediator' as the reason for their answer.

The total of 96% of lawyers interviewed who found the mediation to be either very, or quite, fair. This is significantly higher than results for the similar question put to the survey group (above). It might be explained by the fact that the interview group had some time to reflect on the process since the mediation had taken place (up to a few months), whereas survey respondents were for the most part completing the questionnaire immediately after what may have been a stressful two hours and a failure to achieve a settlement.

In survey answers there is a clear difference between those who did, and those who did not, settle at the Centre. Significantly more survey respondents (both lawyers and clients) involved in cases that settled gave a positive answer to the question 'was the outcome, whether positive or negative, arrived at fairly?' (74.6% of lawyers and clients involved in settled cases). Further, significantly more lawyers and clients involved in cases that did *not* settle gave a 'neutral' (Likert scale '3') reply to this question.

Further differences between those who settled at the Centre and those who did not settle appear in the answers to the survey question which asked whether the mediation process was successful in 'narrowing the issues' in dispute. 60.6% of lawyers whose cases settled answered 'agree', or 'strongly agree', to this question compared with 50% of lawyers whose cases did not settle at the Centre. However, a majority of lawyers in both groups gave a positive reply.

68.5% of all lawyers in the survey group agreed or strongly agreed that their client had been fairly treated.

Lawyers in the group that did not settle were asked whether they had any concerns about the confidentiality of the process at the conclusion of a session which would inevitably have revealed considerable information about the case. However, confidentiality did not appear to be a significant concern. Only 16.4% agreed or strongly agreed with the statement 'you have ongoing concerns about the confidentiality of the process.'

71.5% of lawyers whose cases did not settle at the Centre agreed, or strongly agreed, that mediation had nonetheless provided an important settlement opportunity. Some lawyers in interviews suggested that this might include establishing a better understanding with their client of what his/her expectations should be, how the case should be run etc, afforded by spending two or more hours in a mediation session with the client. As one lawyer put it,

"...it is important for the parties to be given a dose of reality."

Finally, 57% of lawyers whose cases did *not* settle at the Centre still disagreed, or strongly disagreed, that the mediation was a total waste of time. However, 27.3% of this group agreed or strongly agreed with the statement, 'the mediation was a total waste of time'.

iv. the role of the DRO

As stated above, 72.9% of those lawyers in the ADR interview group (including those who had and had not settled at the Centre) who found the conduct of the mediation to be 'very fair' or 'quite fair' gave 'the skill of the mediator' as the reason for their answer.

The critical importance of the competence of the mediator him or herself in shaping perceptions about the ADR process is a recurring theme in both lawyer and client evaluations. Almost 50% of the lawyers who described themselves as 'satisfied' or 'very satisfied' after the mediation gave the skill of the mediator as the reason for their answer. The mediator featured as one of the two

most commonly mentioned 'best' things about the ADR Centre service (see also below). It is instructive to note that the mediator also featured as one of the three most commonly cited 'worst' features and as one of the features of the service that they would 'change' (below). Clients similarly emphasised the critical role of the mediator in their evaluations (below at 5).

61.1% of the lawyer group surveyed agreed, or strongly agreed, that the DRO made suggestions that moved parties towards settlement; and 76.3% of the survey group agreed, or strongly agreed, that the DRO acted neutrally. As one lawyer in the interview group put it,

"the mediator refrained from giving a personal opinion but explained the strengths and weaknesses of the different positions."

However some parties clearly felt that they would have preferred that the mediator take a more proactive role in evaluating settlement options. A majority of lawyers (53.5%) answering the questionnaire survey agreed or strongly agreed that while neutral evaluation by a judge did not occur in their case, it would have been helpful. Unsurprisingly, lawyers whose cases did not settle at the Centre are significantly over-represented in this group. This point is taken up below at 4C.

v. *the quality of outcome*

Outcomes do not appear to figure highly in lawyers' expectations of the mediation process. Questionnaire respondents were asked whether their decision to proceed with ADR was related to an expectation that ADR might provide for more flexibility in outcome than would a trial. 41.8% of respondent lawyers marked this as a reason to proceed with ADR. Another suggested reason was that the mediation process would result in a fairer settlement than a trial. Only 12.1% of lawyers respondents to the survey marked this as a reason.

In evaluating the eventual outcome of their mediation session at the Centre, 71% of lawyers in the survey group whose cases settled agreed, or strongly agreed, that the settlement was a fair one given the circumstances of the case. 21.8% expressed themselves as 'neutral' on this issue. This result is positive, although lower than the result for the same question for the client group³⁸.

45% of lawyers whose cases settled at the Centre either agreed or strongly agreed that the result was as good as the expected trial outcome. Moreover, 30% of lawyers answered this question by marking point '3' on the Likert scale (neutral), suggesting that they could not make this assessment.

Lawyers in the interview group whose cases settled at the Centre were also asked to compare their settlement with an anticipated trial outcome. 62% replied that a trial ruling would *not* have been any better than the mediated outcome. Many of those who said that they expected the trial judgment would have been better than the settlement added that this would have been outweighed by the time and costs accumulated in the period leading up to trial³⁹. As one lawyer put it, "I

expect that the trial would have been a better result on the law but not a better outcome for the client." Other comments included the following.

"We might have paid out less but the costs would have been higher."

"We may have got a bigger judgment, but we wouldn't have collected any more."

Of those lawyers in the survey group whose cases did not settle at the Centre, 27.3% agreed, or strongly agreed, with the statement 'the mediation was a total waste of time.' However, a majority of this group (57%) disagreed or strongly disagreed with this statement, indicating that despite the failure to settle, they still regarded the mediation as a useful opportunity. Furthermore, 39% of lawyers whose cases did not settle nevertheless agreed, or strongly agreed, that they were satisfied with the outcome of the mediation process.

Finally, it is interesting to note that 53.1% of lawyers in the ADR interview group considered that their client was completely or mostly satisfied with the outcome of the case, while only 38% of clients responded this way in answer to the same question (below at 5C).

v. *ADR Centre service generally*

Not surprisingly, significantly more lawyers involved in cases which did settle replied that they were very satisfied with the process. However there was a strong positive response in both categories.

67.5% of lawyers who did not settle, agreed or strongly agreed, that they were satisfied with the services of the Centre.

77.8% of lawyers who did settle agreed, or strongly agreed, that they were satisfied with the services of the Centre⁴⁰.

96.7% of lawyer respondents said that they would definitely participate in ADR at the Centre again (96.7% gave the answer 'yes' where the other choices were 'maybe' and 'no'). 75.9% said that would definitely seek the services of private ADR providers in the future (once again the response options allowed for some qualification - by marking 'maybe' - but this was the answer chosen by only 8.2%)⁴¹.

89.6% of the lawyers in the ADR interview group said they would recommend mediation at the ADR Centre to others. As one put it,

"Even in the worst case, you gather some information and get to know the intentions of the parties."

38.1% of this group said the recommendation would depend on the nature of the case.

The majority of lawyers in the ADR interview group (65.7%) replied that their attitude towards mediation was somewhat or very positive after the session at the Centre. Just under half of these individuals (48.8%) stated that the reason for their satisfaction was that they were impressed with the mediator and the format of the mediation session.

Asked for their assessment of the usefulness of ADR generally, 79.7% replied that they considered ADR to be 'a good way to handle a significant number of cases'. 19.4% responded that they considered ADR to be 'helpful in a minority of cases'. Fewer than 1% considered ADR to be 'a waste of time'.

When asked what they considered to be the two best things about the Centre, the three most common answers given by the lawyers were the skill of the mediator (this answer was given by just over half of the lawyer respondents), environmental issues (such as the physical facilities of the Centre), and cost savings.

C. what aspects of the Centre's service are lawyer users negative about?

i. selection for referral to the ADR Centre

A number of interviewees commented on the current policy of randomly assigning cases to the Centre from the 'pool' of eligible cases.

Some felt that this was inefficient and in certain cases a waste of their time. Several types of cases were characterised as being inappropriate for resolution using ADR, including insurance claims where the insurers did not accept any liability; and medical negligence cases where the medical evidence was complex and highly 'technical'. This issue is discussed in more detail above at 3E and below at 6.

ii. referral processes

One frequently expressed criticism was that the ADR Centre did not allow counsel any choices over scheduling but instead simply notified them of a first date and time. Dissatisfaction with scheduling procedures appears to be related to the high number of adjournments⁴². It is interesting that counsel making this comment clearly regarded a scheduled meeting at the ADR Centre as different from being given a court date (over which there may also be no consultation). Some interviewees clearly felt that this (perceived) difference should be reflected in greater counsel input into scheduling.

When asked what two things they would change about the Centre, one of the two most common answers given by the lawyers was the scheduling process (no one answer was given by a majority of respondents).

57.4% of the survey lawyers and 42.6% of lawyers in the ADR interview group stated that they did not request an adjournment. Of those who did request an adjournment, 68.9% of the survey lawyers and 60% of the interview lawyers gave scheduling problems as the reason.

At the same time, some lawyers complained that the fixed time slots scheduled for mediations were too inflexible; sometimes the mediations they were involved in needed to go longer.

It was anticipated that there might be some significant negativism expressed by lawyer users about the 'opt out' procedures in place at the Centre (as opposed to an 'opt in' model); and the timing of the referral. However neither of these anticipated problems was borne out in the data (see above at 4B).

iii. referral information provided in advance

There was a significant amount of negative comment about the type of information provided to counsel by the ADR Centre. It is important that the following comments are read in light of the new Practice Direction⁴³, which addressed many of the issues raised below.

For cases which were referred during the period of the evaluation, advance information consisted of a faxed letter confirming the referral and the scheduled time and date of a meeting and extracts from the original Practice Direction⁴⁴. A number of counsel commented in interviews that this information was adequate if they had had some experience of either ADR processes and/or previous referral to the ADR Centre, but much less helpful if this was their first time at the Centre. Some mentioned that they relied on opposing counsel to steer them through the process if he or she was more familiar than they with the procedure.

66.8% of survey lawyers replied the information provided in advance from the ADR Centre was very, or quite, helpful. 26% replied that it was 'not very helpful'. Just over half of the lawyers in the ADR interview group (51%) replied that the information provided to them in advance by the Centre was either very, or quite, helpful whilst almost a third replied that it was not very helpful (32.7%). 25.6% of the lawyers in the interview group indicated that after reading the information they were still unclear on the process and/or procedures at the Centre. In particular there appears to be some confusion about the preparation of a joint statement of issues⁴⁵.

When asked what further information might have been provided to them which would have helped, suggestions included "...a clearer idea of what mediation is and what the first mediation is intended to achieve"; a sample joint statement of issues; and the provision of material written in layperson's language which could be forwarded to clients⁴⁶.

iii. the mediation process

Although most comments about the mediation process itself were positive (above at 4B), three items which attracted less positive scores are worth noting.

When asked whether the mediation process revealed facts about the case that helped move the parties towards settlement, 33.8% disagreed or strongly disagreed. However, a large percentage (60.2%) of those who answered 'strongly disagree' were counsel on cases that did *not* settle. This result be interpreted in several ways. It may simply suggest that sufficient information was not forthcoming in the mediation session to permit settlement, or it may reflect an unwillingness on the part of counsel to acknowledge that she has revealed information about the case, even though she may recognise that some of the clarification will help in future negotiations.

57% of lawyers whose cases did *not* settle at the Centre still disagree or strongly disagreed that the mediation was a total waste of time. However this leaves 27.3% who agreed or strongly agreed with the statement, 'the mediation was a total waste of time'. This is not surprising amongst lawyers whose cases did not settle and should be read in light of the number of lawyers who, despite the failure of their case to settle at the Centre, remained positive overall about their experience (see above at 4B).

Lawyers on cases that did not settle were asked whether the mediation process, although unsuccessful, had had a positive impact on the relationship between the two sides. 45% disagreed or strongly disagreed with this statement, suggesting that the mediation may have made the relationship worse. One third gave a neutral response, suggesting that the mediation made no difference to the relationship.

iv. the role of the DRO

The skill of the mediator is clearly central to Centre users' perceptions of the value of the mediation process. As one lawyer put it,

"The quality of the mediator as well as the willingness of the parties is of critical importance."

When asked what two things they would change about the Centre, one of the two most common answers given by the lawyers in the interview group was the mediator him or herself (no one answer was given by a majority of respondents). The mediator him or herself was also one of the two most commonly cited 'worst' things about the ADR Centre.

On questions relating to the neutrality of the mediator and his or her ability to direct the parties towards settlement, high positive scores were recorded and have been described in some detail above at 4B. However, some individual comments raised concerns about both the general role played by the mediator as well as the performance of individual mediators. Since the evaluation was not designed as a performance review of individual DRO's, the account below is limited to the first of these issues.

When asked to explain their satisfaction/dissatisfaction with the mediation process, 16.3% of lawyers in the interview group stated that they wanted more direction from the mediator.

"I would prefer a more interventionist approach from the mediator, because it is more likely to result in settlement."

"The mediator should be more forceful in dealing with the parties. At some point the mediator has to tell the parties when they are being unreasonable."

"The mediator should 'beat people over the head' to get them to settle."

Some of these comments were made by lawyers who appeared to prefer the idea of early neutral evaluation (by a judge). A majority (53.5%) of the survey group said that although ENE did not occur in their case, this would have been helpful. Significantly, lawyers on cases that did not settle are over-represented in this group; 63.8% of counsel whose cases did not settle stated that ENE would have been helpful compared with 42.3% of those whose cases did settle.

There seemed to be some confusion among lawyers in the ADR interview group about the DRO's role as mediator, rather than as judge or umpire. This belied somewhat the very high numbers who said that they had had experience with mediation before (see above at 4A). Other lawyers recognised the constraints of the mediators' role, but nevertheless saw the relative lack of authority or credibility of the mediator as an issue.

"I feel that one of the disadvantages [of mediation] is that the mediator does not have sufficient clout to knock heads, or to lean on counsel or parties where necessary to have them bend on an inflexible position. I understand it's because the mediator wants to be perceived as neutral. But given the restrictive time frame within which the mediation takes place...a resumed mediation at some date several months down the road will have lost much of the impetus gained in the initial session if there isn't more authority in the mediator."

"Sometimes the mediator has to be prepared to take a position or give an opinion."

There are significant problems with blurring the role of the mediator by requiring him or her to act as umpire or judge. The most obvious is that this would transform the process currently offered at the ADR Centre during the first session from mediation to med/arb⁴⁷, or early neutral evaluation, which would have to be conducted by a judge⁴⁸.

As some lawyers pointed out, ENE has disadvantages also. For example,

"A lawyer would be reluctant to go through early neutral evaluation where there is a winner/loser - it would be more difficult to get a settlement having heard this evaluation - thus evaluation is very risky for a lawyer on a 50/50 case."

One further criticism that was made by several lawyers in interviews was that mediators sometimes showed insufficient respect for counsel. These comments may be a consequence of individual DRO's being insufficiently attentive to counsel's views. Equally, they may reflect a

discomfort with a process which explicitly attempts to encourage the participation of clients.

vi. *environmental factors*

When asked what they considered to be the two worst things about the ADR Centre, the three most common answers given by the lawyers were environmental issues (location, parking, refreshment facilities); dissatisfaction with the mediator (above); and scheduling forms/procedures (above). No one item was given by a majority of respondents.

The factor that was mentioned most frequently under the first heading ('environmental') was the lack of good coffee available at the Centre. This single factor was mentioned by a large proportion of lawyers interviewed in the experimental group and clearly troubled many more lawyers than did other factors such as location and lack of parking. Many comments were made in both lawyer and client interviews about the lack of access to refreshments and to snacks. One lawyer in the interview group also commented that some reading material should be available for lawyers and clients while the mediator spoke with the other side.

D. *summary of findings on lawyer satisfaction*

1. a majority of lawyers welcomed referral to the ADR Centre.
2. reducing timelines and legal costs were the most important reasons cited by lawyers for proceeding with a mediation session at the Centre.
3. a majority of lawyers gave positive responses to most questions about their experience of the mediation process at the ADR Centre and the role played by the DRO.
4. the role played by the DRO was critical to the lawyers' perception of the usefulness of both the ADR Centre service and ADR processes generally. A small number of lawyers felt that they wanted the DRO to take a more proactive role, for example, by giving a legal opinion. A majority of the lawyers whose cases did not settle reported that they would have welcomed neutral evaluation by a judge.
5. a majority of lawyers gave positive responses to questions about the fairness of the outcome and satisfaction with the services of the ADR Centre.
6. the minority of negative responses to questions about the mediation process and outcome came significantly from those lawyers whose cases did not settle at the Centre, or from lawyers representing defendants.
7. some negative comments were expressed by a minority of lawyers in interviews over the random assignment of cases to the Centre, the timing of the referral to the Centre, and the 'opt out' procedure for referral to the Centre.

8. a larger group, although still a minority of lawyers, expressed discontent with the scheduling procedure at the Centre, and with the information provided by the Centre in advance of the mediation session.
9. the only feature of the ADR Centre service which attracted almost universal criticism was the coffee.
10. a very high number of lawyers said that they would use the Centre again, recommend mediation to others, and use private mediation services at a future time.
11. very high numbers of lawyers indicated that they considered ADR to be 'a good way to handle a significant number of cases'.

5. HOW SATISFIED ARE CLIENT USERS WITH THE ADR CENTRE?

A. *respondent demographics*

85.3% of the clients completing the questionnaire survey were attending the ADR Centre for the first time. None of the clients in the (ADR) interview group had been to the ADR Centre before.

The prior experience of the majority of the clients in the survey group (73.5%) was limited to one to five civil cases. However 21.2% had been involved in more than fifteen civil cases. These individuals are probably the representatives of major litigators such as insurance companies and larger employers. They are likely to be part of the same group as those describing themselves in interviews as acting in a 'representative' capacity, that is, on behalf of a company or agent, rather than in a 'personal' capacity. This 'representative' group comprised 60% of all clients interviewed in both the ADR group and the control groups. The very different needs of the representative group compared with the 'personal clients' group (for example regarding information provided in advance, scheduling) will be important considerations in the planning of any future program.

77.8% of the clients surveyed had no ADR experience. Of those who did have past experience with ADR, approximately one third was with court-annexed ADR programmes and two thirds with private ADR services. Only three of the clients in the experimental interview group had had previous experience with mediation, while seven had had previous arbitration experience.

50% of the clients interviewed were between the ages of 30 and 45. A quarter of the clients had only a high school education while another quarter had a college education and half had a university degree. 75% of clients interviewed were male.

B. *what aspects of the Centre's service are client users positive about?*

i. *referral*

A slim majority of clients in the interview group (52.6%) said that they welcomed the opportunity to try mediation. However a number of concerns were expressed about the need for more advance information and clarity on what to expect in the process. 14% of clients in the survey group said that they expected they would have to compromise their position in mediation. These concerns are discussed further below at 5C.

A slim majority of clients in the interview group said that they were 'very optimistic' about the prospect of trying mediation in this case, but a further 21% said that they were somewhat optimistic. This is higher than figures for the same question put to the lawyers in the interview group (see above at 4B).

ii. *reducing the costs and timeframe of resolution*

Unsurprisingly, clients were as preoccupied as their lawyers with the practical advantages of mediation, that is, saving time and money. 81.3% of clients in the survey group said that they expected that mediation would result in a faster resolution of their dispute. 75.4% said that they expected that mediation would save them money in terms of their lawyers fees.

Data collected from control group clients about their experience of the litigation system make this preoccupation with timelines plain. Lengthy delays in either reaching settlement, or ultimate resolution at trial, emerged quickly as themes in interviews conducted with control group clients. A majority of this group (58.4%) expressed themselves to be only partly or not at all satisfied with the progress and/or outcome of their case through the traditional litigation system. Of these, a majority gave the length of time taken to process their case as the reason for their dissatisfaction. For example,

"It seemed to drag on and on forever. This was very difficult."

"Things seemed to move so slowly. We had to wait so long. And now here we go again. The other side is appealing."

iii. *the mediation process generally*

Clients in the interview group generally reported high levels of satisfaction with the mediation process. An overwhelming majority (89.5%) said that they were either somewhat or very positive about mediation after their experience at the Centre. The only issues that arose in interviews on which any significant negativism was expressed (and this was very much a minority view) related to the role played by the DRO, specifically the neutrality of the mediator and any pressure exerted by the mediator towards settlement. These are discussed below at 5C.

Questions asked of clients in the survey group about their evaluation of the mediation process itself all produced high positive scores. For example, 82.3% of clients in this group agreed or strongly agreed that the DRO explained his or her role adequately; 80.2% said that they understood everything that went on in the mediation; 72% said that they felt that they had sufficient opportunity to respond to the other side; and 55% said that they were satisfied overall with the mediation process.

A majority of clients (69.6%) whose cases settled at the Centre considered themselves 'very satisfied with the overall process'. Furthermore, of those whose cases did *not* settle at the Centre, 50% still agreed, or strongly agreed, with this statement. Despite these generally positive results, a significant number of client respondents marked themselves either in disagreement, or simply neutral (marking point 3 on a five point Likert scale), in response to this statement. Furthermore, nearly 30% of clients surveyed said that they felt pressured to agree to some aspects of the settlement. These responses are discussed further below at 5C.

Clients in the survey group were also asked whether 'the outcome, whether positive or negative, had been arrived at fairly?'. 66% agreed, or strongly agreed (almost identical to the result for the question for the lawyer group). However, as many as 21.3% gave a 'neutral' response to this question. 12.6% disagreed, or strongly disagreed that the outcome had been arrived at fairly. This too is comparable to survey results from the lawyer group, who were asked to respond to the same question (above at 4B). As with the lawyer group, there is a correlation between clients whose cases failed to settle at the Centre and those expressing a neutral or negative view of the process. Some further reasons for the number of clients expressing dissatisfaction or not committing themselves when asked whether the process was fair are explored below at 5C.

In responding to the statement, 'mediation revealed facts about the case that helped move the parties towards settlement', clients were significantly more in agreement (42.2% agreed or strongly agreed) than lawyers (33.3% agreed or strongly agreed). In neither group, however, did a majority agree with this statement. The different reactions of lawyers and clients may simply reflect a greater caution on the part of counsel in relation to information disclosure. It may also reflect the fact that the lawyers already knew much of what they heard in the mediation session beforehand, but had not necessarily passed on this information (for example about the other side's case) to their client⁴⁹.

While ADR clients in the interview group were generally positive about their engagement in the process of mediation at the Centre, it is interesting to note that the results are no better (and in some cases less positive) than results obtained from comparable questions asked of clients in the control group. This is discussed in more detail below at 5C.

iv. the role of the DRO

82.3% of clients agreed or strongly agreed that the DRO explained his or her role adequately.

81.5% of clients agreed or strongly agreed that the DRO explained the mediation process adequately.

86.3% of clients agreed or strongly agreed that the DRO acted neutrally. This was reflected in many comments made in interviews, for example,

'You could tell that the mediator was totally unbiased. He could see all sides. He was very skilled at asking the right questions and forcing us all to examine the issues from all sides.'

However 21% of the clients interviewed said that they felt that the mediator showed some bias (this point is taken up below at 5C).

In common with the lawyers, the client group clearly relied heavily on their perceptions of the mediator in assessing the usefulness of the ADR Centre service and ADR processes generally.

Half of those who said that they were satisfied or very satisfied with the ADR Centre services cited the skill of the mediator as the reason. For example,

'The mediators' opening remarks were very impressive. It set the tone, the mood for the mediation. Everything flowed from that introduction. We all knew why we were there and what was expected.'

v. *the outcome*

In common with the lawyers surveyed, clients who completed the questionnaire survey did not appear to have a high expectation that mediation would produce a fairer settlement than trial (32.8%). However, there seemed to be more support among clients for the proposal that mediation might produce a range of more flexible outcomes (56.5% compared with 41.8% for the lawyer group).

A slim majority (52.2%) of clients in the survey group whose cases settled felt that the settlement was as good as the expected trial outcome. 19.7% of clients in the survey group whose cases settled did not commit themselves on whether early settlement at the Centre saved their legal fees (marking '3' or neutral on the Likert scale). This is probably because they felt unable to make such a judgement.

75.8% of clients surveyed whose cases settled at the Centre agreed, or strongly agreed, that the settlement was fair given the circumstances of the case. This is somewhat higher than the result from the lawyer group for the same question (71%). It is notable that while only 30.6% of lawyers marked 'strongly agree' in response to the statement, 'the settlement was fair', a much larger proportion (53.4%) of clients registered their 'strong agreement' with this statement. There were also many fewer clients marking a 'neutral' response to this question (12%) compared with their lawyers (21.8%). Presumably the 'strongly agree' group represents those clients whose cases settled at the Centre who wish to endorse the decision to settle. However, this result seems somewhat at odds with the numbers of clients who indicated that they felt under some pressure to agree to a settlement (see 5C below).

Where no settlement was reached at the Centre, 41.1% of clients 'strongly disagreed' that the mediation was 'a waste of time' (comparable to the figure for lawyers answering the same question).

vi. *the ADR Centre service generally*

Asked to rate their overall experience with ADR after completing a session at the Centre, 72.3% of clients replied 'positive' or 'very positive', and only 7.7% responded somewhat or very negative.

95.5% of clients said that they would participate in ADR at the Centre again, although more plaintiffs than defendants gave this reply.

85.3% of clients said that they would make use of private ADR services⁵⁰.

The vast majority of clients in the interview group replied that they were very or somewhat positive about mediation in general (89.5%). Like the lawyers, just under half of this group gave the skill of the mediator as the reason for their response (47.1%) (above).

Clients in the interview group considered the two best things about the Centre to be (i) that the service provided helps facilitate communication and possible settlement (roughly half of all clients gave this response) and (ii) the physical facilities offered by the Centre.

A number of clients in the interview group commented specifically and with approval on the decor and lay-out of the Centre, the comfort of the offices and meeting rooms and the atmosphere of informality which they felt promoted settlement.

One satisfied customer expressed himself thus.

'I was really impressed. This was a pretty tough case. If they could be successful in a case this difficult and help us, then I think that they could do the same for anyone.'

C. what aspects of the Centre's service are client users negative about?

i. lack of advance information about the process

The following data was collected before the introduction of the revised Practice Direction, which may serve to address many of these points.

42.1% of clients in the interview group said that they welcomed referral to the ADR Centre 'with some reservations'. A further 5.3% said that they did not welcome it. The most frequently cited reason given for not welcoming the referral was they were unsure of the outcome. Indicative comments included the following.

"I didn't know what was going to happen and I was afraid that we would get a settlement that we wouldn't like."

"I was scared by the idea of ADR; I had no idea what to expect."

"I didn't find out [about the ADR session] until my lawyer informed me on the way down to Toronto [for the session]. Until then I had thought that we were going to trial."

Although approximately 60% of the lawyers in the interview group said that they had a somewhat or very optimistic attitude towards mediation in advance of the session (see above), in contrast, only 47.4% of clients interviewed said that they were very optimistic and 36.8% were very or somewhat sceptical. 33.3% of clients in the interview group said they were not

sure what issues would be resolved at mediation. For example,

"I felt that the [other side] was stringing me along; I didn't want to attend. My lawyer insisted that I did."

"I wasn't sure that the other side would put their cards on the table."

"In a dispute over money where both parties didn't seem to have much room for settlement, I doubted that it would work."

16% of clients in the survey group stated that they were very unclear or rather unclear about the process before they began mediation (and following any briefing they received from their counsel).

57.9% of clients in the ADR interview group said that they were 'not at all familiar' with the process before they began their first mediation session. When asked how and when they had been briefed by their lawyer in advance of the session, 36.8% replied that they had been sent the materials from the ADR Centre (noticeably fewer than the 49% of lawyers who said that they had done this); 63.2% said that they had talked with their lawyer on the phone; 42.1% said that they had met specifically to discuss the mediation (60.8% of lawyers said that they had done this); and the largest group (78.9%) said that they had been briefed by their lawyer in a meeting just before the scheduled session.

ii. the mediation process

In response to the statement 'you were very satisfied with the overall process', 26% of all ADR Centre clients surveyed marked a score of 3 (indicating a 'neutral' position) and a further 19% disagreed or strongly disagreed with this statement. There was a clear correlation between clients marking these answers and clients whose cases failed to settle. For example, 27.2% of clients whose cases did not settle at the Centre disagreed or disagreed strongly with this statement. However, it is notable that another 50% of this group agreed, or strongly agreed, that they were satisfied with the process.

While it may be unsurprising that a quarter of those clients whose cases failed to settle were dissatisfied with the process, it is nonetheless high enough to require some analysis. In addition, 20% of those whose cases *did* settle marked themselves as simply 'neutral' in answer to this question. Another question asking clients in the survey group to respond to the statement 'the outcome, whether positive or negative, was arrived at fairly?', also produced a significant number of neutral (21%) or negative (12.6%) responses.

These negative results are at odds with the high positive scores recorded on most specific aspects of the mediation process (for example the role of the DRO, their chance to respond to other side, mediation revealed facts etc; see above at 5B). High positive scores were also given to the use of mediation generally (72.3% were 'positive' or 'very positive'), although this may be

explained by the very general nature of this particular question.

So what are the process concerns of the unsatisfied (or non-committal) group likely to be? Some clues to the source of the dissatisfaction (other than simply not being able to settle) may be found in the client interview data. The concerns that appear there relate first, to the neutrality of the mediator and second, to the pressure felt by some clients (both from their lawyers and from the mediator) to settle the case. The first concern over mediator impartiality was expressed by 21% of the interview group and generally related to a perception that the mediator was 'pumping up' the other side's claim. For example,

"the mediator kept bringing to the fore the fact that the other side had a disadvantaged background."

This comment may be based on remarks made by the DRO in caucus, when some clarification by the mediator of the interests of the other side might be anticipated. More generally, it may be a response to efforts by the mediator in some cases to play a part in redressing any apparent power imbalance between the parties.

The second aspect of the process on which some negative comment was made in interviews was the placing of pressure on clients to settle. This accords with some figures derived from the survey; for example, 18.1% of clients said that they expected to have to compromise their position in mediation and nearly 30% of clients surveyed said that they felt pressured to agree to some aspects of the settlement. Unfortunately the questions and answers do not make clear by whom they felt pressured, the mediator or their lawyer⁵¹.

Interview data suggests that both were seen as a source of pressure by clients. The experimental group spoke of both lawyers and mediators pressing them to settle. For example,

"I felt that we settled under duress. We were there for ten hours. No food, no restaurants in the area, the coffee was awful, no one had change for the machines. I felt hurried and pressured at times."

In this case the trial was scheduled for the very next day, resulting in obvious stress for all involved in the mediation.

Another client commented,

"I felt that it was not for me, but I agreed to it just to get it over with."

And another,

"I felt bulldozed by the mediator."

It may be that at least some of the pressure that was experienced by these clients was a consequence of their mandatory referral to mediation, especially where they were unfamiliar with the process. A further explanation for some feeling of pressure could come from the general lack of readiness among clients for the mediation process (see above). For example,

"I didn't get enough information about the process beforehand...I felt a lot of pressure of time and what would happen if they didn't agree today."

Turning to another area in which evaluation was less positive than anticipated, data was collected in both the survey and in interviews, about clients' perceptions of the kind of role they might play in a mediation, compared with a process of settlement conducted by their lawyers or an eventual trial. Relatively low numbers of clients participating in the survey marked as important expectations that the mediation process would be easier to understand than a trial (41.4%); that it would allow the client to play a greater role than a trial (38.4%); that it would be more private than a trial (41.8%); or that mediation would afford a greater opportunity to the client to explain his or her side of the case than a trial (45.9%).

While one possibility was that these results reflected a lack of experience with the trial process (so that the client had an insufficient basis for comparing the two processes). However, cross-tabulation revealed that those with more trial experience were significantly more sceptical that there would be any real differences in their role in a mediation, than those with less trial experience. Accordingly those with less trial experience appeared to be more optimistic that mediation would significantly alter their role. Another possible explanation may be that those with little ADR experience might be the most sceptical about the process; however, there was no statistically significant correlation between those who had more or less ADR experience, and responses to these questions.

While ADR clients in the interview group were generally positive about their engagement in the process of mediation at the Centre, it is interesting to note that the results are no better (and in some cases less positive) than results obtained from comparable questions asked of clients in the control group.

For example, 84.2% of clients in the ADR interview group felt the mediation session was run either very or quite fairly, with 58.8% of this group citing the skill of the mediator as the reason for their reply. Very similar results were obtained from clients interviewed as part of the control group who were asked to rate the 'fairness' of the litigation process. 80% described the process as 'very fair' or 'quite fair' and 20% describing it as 'somewhat' or 'very' unfair.

This lack of distinction between the process qualities of mediation, and those of traditional litigation, is reflected in other data also. For example, 84.2% of clients in the ADR interview group stated that they understood 'everything that was going on' during the mediation (almost identical to the response of the clients participating in the survey; see above); while 100% of control group clients said that they understood 'everything' that was going on when their case

was argued before a judge⁵².

It was anticipated that mediation, when compared with the traditional litigation process, would afford the client an enhanced role to play. 63.2% of ADR clients who were interviewed said that they felt 'very much a participant' in the mediation, and 36.8% said that they felt like a 'marginal' participant. In fact a higher number of clients in the control group (72.7%) said that they felt 'very much' like a participant in their case. This result may reflect the difference between an evaluation of a single event (the mediation), and the whole process of litigation. It may also be explained by some unwillingness on the part of clients to admit that they felt like only a 'marginal participant' in the whole process.

57.9% of clients interviewed in the ADR group said that their lawyer was 'in control' of the direction of the mediation and slightly more than one third (36.8%) said that direction was shared between lawyer and client. 68.4% liked their level of participation; only two clients said that they were dissatisfied with their level of participation. Again there is little difference between these answers and those given by clients interviewed as part of the control group. In answering the same question 47.1% of clients in the control group replied that their lawyer was 'in charge' of the process, and 50% (more than the comparable group for the ADR clients) stated that control was shared.

It is notable that when lawyers in the interview group were asked this same question, a number of those who responded that they were 'in control' of the mediation volunteered that all they were doing was running the case 'as usual'. Presumably they did not see any reason why a mediation would be organised any differently from any other aspect of the management of the case.

Taken as a whole, however, these results clearly indicate that clients are simply not experiencing the mediation process as significantly different from the other actions and decisions that are taken on their file. These results are considered surprising, and some possible explanations are offered.

One possible explanation is that 'representative' clients (representatives of a company, for example an insurance company) are already accustomed to playing a decisive role in the management of their file and that mediation does little to alter this. Equally 'personal' clients, may continue to assume that their lawyer will be the decisive actor.

Another possible partial explanation for these results may be the extent to which mediations at the ADR Centre after the initial meeting place the parties in separate rooms ('caucus') and conduct 'shuttle mediation'. No data is available on this but it would appear from discussions with mediators at the Centre that this is a commonplace strategy. There are well-established rationales for the use of caucusing in mediation⁵³. Nonetheless one consequence is that client to client communication is inevitably limited by separating the parties in this way and this may mean that lawyers again play the dominant role⁵⁴.

One final explanation offered for these results is that it stems from the fact that clients often come to mediation at the Centre poorly prepared, and without a clear idea of what role they might expect to play in the process (see below at 5C). Where clients are poorly briefed about the purpose and format of mediation, the short time (a session scheduled for two hours) in which are expected to get 'up to speed' with the mediation process may be insufficient to ensure their full participation. In such cases the client is unlikely to play a major role and might even feel uncomfortable being catapulted into a more participatory role. As one client put it in an interview,

"I wasn't very happy with the type of participation required because I hadn't come prepared to participate."

iii. *quality of outcome*

Almost a quarter of clients in the interview group responded that the mediation achieved nothing at all and that no issues were resolved. 50% reported that the mediation had not helped them to understand the other side's position 'at all', and only 5% said that their relationship with the other side was better now than before the mediation (the vast majority said that it was 'about the same', neither better nor worse).

In the ADR interview group, there was a significant gap between the number of clients whose cases were resolved in mediation (50%) and those expressing themselves to be 'mostly' or 'completely' satisfied with the outcome of the case (38%).

Of clients whose cases settled at the Centre, 7% of those responding to the survey said that they 'disagreed' that the settlement reached was fair. This is a small number but suggests that these clients felt pressured into accepting an agreement with which they were not fully happy. There is further evidence to support this elsewhere in the survey data. 30% of all clients in the survey group said that they had felt pressured to agree to some important points (above).

Once again, some connection may be drawn between dissatisfaction with outcome and the lack of readiness of some clients for what the mediation process would involve. For example,

'I wasn't as prepared for ADR as I could have been, so I couldn't accept what came out of ADR either.'

iv. *the role of the DRO*

Comments by clients about the DRO's tended to be closely tied to their comments about the mediation process generally (and the DRO as the manager of that process). These have already been discussed under (iii) above.

There was some mention in several client interviews of the need for the mediator to take a more aggressive line in making his or her own opinion clear - for example, "the mediator was too

fair. S/he should have given an opinion" - but much less was made of this point by clients than by lawyers (above at 4C).

v. *ADR Centre service generally*

Clients were generally less enthusiastic than the lawyers about the services provided by the Centre. 41.2% of clients agreed, or strongly agreed, that they were 'satisfied with the services provided by the ADR Centre' (compared with 77.8% of lawyers).

The most common answers given by the clients in the interview group to the question 'what are the two worst things about the ADR Centre?' were problems with the mediator and the mediation process; and environmental issues (again, no one answer was given by a majority of clients).

When asked what two things they would change about the Centre, the most common answer given by the clients in the interview group was the mediator him or herself (no one answer was given by a majority of respondents).

D. *summary of findings on client satisfaction* *

1. clients expressed greater reticence and uncertainty about the mediation process than lawyers and often seemed significantly ill-prepared for mediation.
2. clients were generally positive about the mediation process itself, and generally positive about the DRO. Where concerns were expressed, they usually related to either a perception that the mediator showed some bias; or contributed to some pressure to settle (see below).
3. in common with lawyers, client perception of the expertise of the DRO who worked on their case was critical to their overall evaluation of the mediation experience.
4. clients did not understand the mediation process as offering them an enhanced role to play in dispute resolution, compared with litigation.
5. clients, particularly those who had had significant civil litigation experience, appeared not to expect significant differences between the mediation process over traditional legal procedures.
6. clients whose cases settled were more strongly positive about the fairness of the settlement than were their lawyers. However, 14% said that they entered mediation expecting to have to compromise and 30% said that they felt pressured to agree to some aspects of the settlement, although the source of the pressure was not clear.

7. clients were generally positive about the services of the ADR Centre, although less so than their lawyers.
8. clients were very positive about their overall experience with ADR and a very large majority said that they would make use of private ADR services in the future.

6. WHAT ARE THE BARRIERS TO SETTLEMENT USING ADR?

A. *data sources*

Information on what was perceived as a barrier to settlement was derived from a number of sources. Each source can be used as a cross-check on the other sources and as means of clarifying the information provided. The primary sources were:

- i. questionnaire survey data from lawyers and clients;
- ii. interview data from experimental (ADR) group lawyers and clients;
- iii. information solicited from a sample group of fifty lawyers who had chosen to 'opt out' of the ADR Centre procedure in respect of a given case;
- iv. mediator disposition sheets (in which mediators record their perspective on any barriers to settlement in a given case once a mediation session has been completed) for cases in the experimental (ADR) interview group;
- v. ADR Centre statistics on barriers to settlement generated from mediator disposition sheets.
- vi. relevant data from Sustain

B. *cases that opted out of the ADR Centre*

Cases that chose to opt out of the ADR Centre procedure provide an obvious starting point for a consideration of barriers to settlement. These cases have been consciously 'deselected' for ADR.

While opt out formally requires the agreement of both sides (that ADR would not be helpful to the resolution of this dispute), in practice if one side is determined to opt out the other has little choice.

Analysis on Sustain revealed that opt outs are *less* frequent in wrongful dismissal cases than in the other two case groups (breach of contract/negligence, and all 'other' cases) distinguished for the purposes of the evaluation. Opt outs were *most* common in breach of contract/negligence cases (see Tables Three and Six, above Part One).

A total of twenty six counsel responded to phone calls and faxes soliciting their input on why they chose to opt out of the ADR Centre in relation to any particular case. For these cases (a total of thirty five) information was provided either by written letter or fax, by telephone interview or through participation in a breakfast-time 'focus group'.

The most frequently cited reason for opting out was that the other side refused to participate in ADR, and that without the co-operation of the other side mediation was hopeless (above). In those cases in which another substantive reason was given for a decision to opt out of ADR the following were the most commonly described 'barriers'.

i. *the referral came too early*

This reason was given in the majority of cases which provided a substantive reason for opting out. For example, in one case counsel pointed out that referral took place before the close of pleadings where there was a third party defendant and counter-claims were still being filed. In several other cases involving alleged medical negligence, counsel stated that the reason for opting out was because critical medical evidence was not yet available.

ii. *complexity of the factual issues*

This was the next most frequently cited reason (along with (iii) below) for opting out. Mention of complexity was generally related to a concern that it was too early for settlement discussions in this case (see above at (i)). Typically, the case involved medical evidence which it was thought the mediator would be unable to fairly assess in the context of a negotiation between the parties.

"In cases where the fact situation is very complex, I have taken that case out of ADR...because ADR would not have achieved any benefit. It would take a very detailed and lengthy examination for discovery of each party to sufficiently narrow the issues in order to determine if ADR was going to be an effective vehicle for resolving the dispute."

iii. *complexity of the legal issues*

In other cases counsel suggested that the legal issues involved were untested and highly complex and that mediation would be inappropriate. For example, one lawyer wrote that

"The decision [to opt out] was based on the nature of the claim which was very detailed and legalistic and relying on technical interpretations of various statutes..."

Many lawyers would be unwilling or unable to enter into settlement discussions without first developing their legal case, including full appraisal of the legal and factual issues. However, this perspective may reflect lack of information or a misapprehension over the purpose of mediation, which is not to make out a legal case, but to explore the parties interests and options.

iv. *defendant did not accept liability*

Several lawyers who responded said that their client was unwilling to accept liability in the action and hence ADR - or any settlement discussions for that matter - were inappropriate. For example,

"The insurer alleged fraud on the part of the plaintiff insured and consequently the insurer was absolutely unprepared to make any contribution towards settlement whatsoever. In these circumstances, an ADR session would have been pointless."

This is one possible explanation for the tendency of defendants' lawyers to be generally more negative about referral to the ADR Centre than plaintiff lawyers (see above at 4B).

v. *credibility a central issue*

Several lawyers expressed the view that where the credibility of one or the other side was relevant to the evaluation of offers of settlement, then mediation is an inappropriate forum. It was not always clear here whether they were referring only to the other side, or to their own client also. In these cases a formal discovery process was considered to be more suitable.

The question of credibility is also related by some lawyers to basic issues of liability, that is, whether the plaintiff really has suffered the loss alleged (see above at (iv))

This perspective on credibility is not without its detractors. Some lawyers in the interview group described how they saw mediation as an informal opportunity to assess the credibility of the other side's allegations and how this party - and one's own client - would come across in testimony before a judge (see also below at 6D).

vi. *other*

Other barriers cited by lawyers whose cases had opted out included the commencement of criminal proceedings against one party; the distance that clients from Northern Ontario or outside the province would need to travel in order to attend an ADR session; and the failure to obtain instructions from the client on whether or not to proceed with ADR.

vii. *attitudinal barriers*

Survey data provides one further insight into the thinking of counsel who chose to opt out. All lawyers surveyed were asked whether they only proceeded with mediation only because the other side would not agree to opt out. A majority in all cases (92%) answered 'no' to this question. However, lawyers involved in cases that came to the Centre but failed to settle were significantly *more* likely to answer 'yes', (that they proceeded only because the other side would not agree to opt out), than those who settled (13.3% of the not settled group, compared with 6% of the

settled group). This suggests that a further barrier to settlement present amongst the opt out group may be a belief that settlement is unlikely. It is, of course, only speculation that these cases might otherwise have been resolvable, but the correlation of those who would have preferred to opt out with those who failed to settle is statistically significant.

C. cases that adjourned the first mediation session

Around half the mediations scheduled at the ADR Centre adjourn the first session⁵⁵. This may change following the introduction, in the revised Practice Direction⁵⁶, of penalties for late cancellation. However, the problem of adjournment was one of the issues that the evaluation was asked to consider.

When asked whether they adjourned the first scheduled mediation, 57.4% of the survey lawyers and 42.6% of lawyers in the ADR interview group stated that they did not (this would appear to be an underreporting in light of adjournment statistics). Of those who did request an adjournment, 68.9% of the survey lawyers and 60% of the interview lawyers gave scheduling conflicts or other scheduling problems as the reason. The time and date of the first scheduled mediation is fixed by the Centre (although parties may, on consent, request an adjournment to an alternative time and date which they choose). In the early stages of the pilot the first mediation was scheduled for a date not more than six weeks after referral. More recently this has become extended to sixteen weeks owing to a backlog created by the high adjournment rate.

One possible interpretation of the high rate of adjournments is that lawyers adjourn the first session in order to allow themselves more time for preparation. However, when asked whether they felt that they had adequate opportunity to prepare for settlement discussions given the timing of the referral, 79.6% of lawyers who responded to the survey replied that they did. Only 10% cited more time needed to prepare as a reason for asking for an adjournment. Furthermore, of the minority of all lawyers who complained that the timing of the referral gave them inadequate time to prepare, defendants' lawyers were proportionally over-represented. (70.5% of those who said that they had inadequate time to prepare). These lawyers may have felt unwilling to put the necessary time into preparing for mediation where they believed that the case might shortly be dropped by the plaintiff⁵⁷.

An even larger majority of the interview group (88.2%) replied that the stage at which this case was referred to the Centre allowed them to adequately prepare for settlement discussion. Nearly 60% of this group explained their answer by saying that either the issues were already clear at the stage at which the case was referred (that is, after filing of the first statement of defence); or that the case was not complex and did not need to proceed to discovery in order for settlement discussions to take place.

It would appear, then, that in relation to any one particular case, lawyers are generally unwilling to acknowledge that they cannot be ready for settlement discussions after the filing of the statement of defence and are unlikely to give this as the reason for requesting an adjournment. A small number of cases may be characterised as especially 'complex' (above at 6B) and

demanding additional resources not available before mediation. However, when asked in case study interviews to estimate the degree of complexity of the case they were working on, only one in five lawyers described their case as 'complex'.

None of this data supports an adjournment rate as high as almost 50%. Other reasons for the high rate of adjournments must therefore be considered. One is that lawyers do not regard dates set for mediation as carrying the same degree of formality or weight as court dates. This attitude may be countered, at least in part, by the imposition of cancellation fees from September 1995⁵⁸.

Another possible reason is that the adjournment rate is a reflection of the hesitancy of the profession to deal with settlement options at this early stage of a litigation matter. Data on settlement patterns and behaviours outside the ADR Centre (above at 3B and 3E) suggests that the timing of mediation at the ADR Centre is scheduled to occur earlier than settlement ordinarily occurs in the 'typical' history of a litigation matter. A solution to the problem of adjournments may require the reorientation of the profession to the use of mediation for settlement discussions, where interests rather than rights are the focus, and the subsequent questioning of some of the assumptions presently held about the 'readiness' of a file for settlement negotiations.

D. cases that came to the Centre but did not settle

Before examining settlement barriers, it is instructive to consider first what lawyers and clients whose cases *did* settle at the Centre described as the reasons a settlement was reached⁵⁹. Costs (88.9%) and time (77.8%) were the most significant factors to clients in reaching settlement, followed by rapport between lawyers (66.7%) and the mediators skills (55.6%). The lawyers' comments reflected these same preoccupations. When asked why they thought that this case had settled, only one factor (saving/ avoiding cost) was given by a majority of lawyer respondents (59%). The factor chosen second most often by lawyers was the weight of facts/evidence (45%), and the third was the weight of legal opinion (30%).

For cases that came to the Centre for a mediation session but did not settle, information on barriers to settlement has been derived from completed questionnaire surveys for unsettled cases (approximately 350 surveys), interviews with lawyers and clients on cases that did not settle (approximately half the 70 interviews conducted with subjects from the experimental ADR group) and from records completed by mediators immediately following an unsuccessful mediation (the 'mediator disposition sheet').

The barriers to settlement described by lawyers and clients whose cases did settle overlap with the types of barriers described above by lawyers whose cases opted out. In addition, settlement barriers for parties who did meet and attempt settlement include issues that relate to the relationship between clients and sometimes also between the lawyers.

The questionnaire survey presented clients and their lawyers whose cases did not settle with an identical list of possible barriers to settlement, and invited their response. This list was compiled with the assistance of members of the Evaluation Advisory Board and also reflected initial interviews with case study subjects. Further 'barriers' could be added by the respondent.

In interviews some possible barriers were suggested but generally the interviewee was asked to formulate his or her own description of what had impeded settlement in their case. The categories which emerged from coding included all those articulated in the survey, and a few additional categories.

It is noticeable that generally a smaller proportion of lawyers and clients in the interview group gave specific reasons for their failure to settle than the group that completed the questionnaire survey. This discrepancy may be explained by the fact that survey respondents were presented with a list of possible reasons to choose from. It may also be explained by the passage of time; interviewees were reflecting on a failed mediation some two or three months past whereas the majority of survey respondents were completing the form immediately after the conclusion of an unsuccessful mediation when a sense of failure (and the reasons perceived for failure) may have been more acute.

Survey data (which represents a significantly larger group) is relied upon primarily in the description of barriers which follows below. Interview data is used as a secondary source to support, and sometimes to clarify the meaning of some of the barriers identified by the survey group.

i. the relationship between the parties

a. hostility

Survey respondents were asked whether 'hostility between the parties' was a barrier to settlement in their case. 35% of lawyers and 20.5% of clients marked this as a factor in failing to settle.

There is a significant discrepancy in this result between lawyers and their clients, with lawyers apparently seeing party hostility as more of a problem than did their clients. This is at odds with interview data, where only 16.1% of lawyers characterised party hostility as a problem compared with 63.6% of clients (this was the problem most frequently cited by clients in interviews as a reason for failing to settle). A number of clients talked about the emotionality of the dispute and how this had become, they felt, an impediment to settlement. Only a small number (11%) of clients in interviews considered that their relationship with the other side was improved as a result of mediation. A large majority (83%) felt that the mediation neither improved, nor worsened, their relationship with the other side.

In addition, a number of clients interviewed as part of the ADR group said that they considered a hostile relationship between the *lawyers* for each side to be a significant impediment to constructive settlement discussions. For example,

"their egos [the lawyers] got in the way of discussions. It may have worked better without the lawyers being there."

Another client observed that,

"it seemed like the lawyers came in with more of a chip on their shoulders than the parties."

The same point was made by several lawyers who were interviewed as part of the control group. In two cases the lawyer for the other side was described as 'notoriously' resistant to settlement. In the words of one lawyer,

"I had a poor rapport right from the start with the other lawyer. He was belligerent from day one..."

b. lack of co-operation by the lawyer for the other side

Survey respondents were also given the option of marking 'other side (lawyer) unco-operative' or 'other side (client unco-operative)' as reasons for failing to reach settlement. Failure to co-operate was intended as a milder and less emotive alternative to identifying 'hostility' between the two sides.

24.8% of lawyers and 30.3% of clients indicated that lack of co-operation on the part of the other side's *lawyer* was a reason for the failure to settle. Proportionately more clients than lawyers identified this as a problem. This difference is probably accounted for by the greater reluctance of lawyers to characterise the behaviour of other lawyers as inappropriate. However significant numbers of both lawyers and clients indicated that this was a problem.

Lack of co-operation by the other side (generalised and not specified as client or lawyer lack of co-operation) was the reason given most frequently by lawyers interviewed as part of the ADR group (61.3%) for failing to settle the case⁶⁰. In addition, 50% of the lawyers who were interviewed as part of the control group and whose cases had not yet settled, said that lack of co-operation (by either the lawyer or the client) was the major reason for the failure to settle⁶¹.

What types of behaviour might be characterised as 'lack of co-operation' on the part of a lawyer? Interview data sheds some light on this. Lawyer interviewees highlight unnecessary or unjustified delays, lack of preparation (below), and coming to mediation without a genuine intention to seek settlement. Client comments in interviews extend this list to include the lawyer for the other side failing to provide a sufficient range of possible solutions. For example,

"Not enough options or compromises were offered by the other side."

A number of clients referred in interviews to the lack of readiness by the other side as a significant factor in failing to reach settlement (there was also mention of lack of readiness on the part of clients personally, who felt that they had not been adequately briefed in advance by their counsel; see above at 5C). Mediator disposition sheets include 'lack of preparation' and 'lack of information about the case' as separate heads in the evaluation of barriers. Taken together, these two categories were marked by mediators as the third most common barrier to settlement, although they are scored as having represented 'significant barriers' in just 6% of all cases (both settled and unsettled)⁶².

One final issue that could be included under the general head of 'lack of co-operation' is an absence of authority to settle among the representatives present at the mediation. This is mentioned by several clients in interviews, and also appears on the mediator disposition sheet under two possible heads; 'critical participants not present' and 'lack of authority to settle'. These are rated by mediators as (respectively) the second and third most common barriers to settlement, although the occasions on which either is seen to have operated as operating as a 'significant barrier' are numerically small (5% and 7% respectively).

c. lack of co-operation by the client on the other side

36.9% of lawyers and 18.2% of clients marked the lack of co-operation of the other side's *client* as a reason for failure to settle. The discrepancy noted above between lawyers' and clients' evaluation of the 'co-operation' of counsel for the other side, is now apparent in reverse. Here many more clients (81.8%), than lawyers (63/1%), said that the attitude of the client on the other side this was *not* a factor.

What types of behaviour might be characterised as 'lack of co-operation' on the part of a client? Again interview data can be of assistance. The most common examples given by lawyers and clients of unhelpful behaviour on the part of the client on the opposing side were an unwillingness to make a 'decent offer' and general 'stubbornness'.

Another reason why clients may appear 'unco-operative' is their unrealistic expectations about what they can expect to achieve from either mediation or litigation. Some lawyers interviewed in both the ADR group and the control group felt that the other side had been ill-advised by counsel about his or her alternatives to settlement. For example,

"the plaintiff was very puffed up in relation to what to expect and was not put straight by his unexperienced lawyer. There was no pressure on the client to settle."

'Unrealistic expectations by one party or more' was adopted as a category by ADR Centre DRO's in the mediator disposition sheet completed by the mediator immediately following a session. This was by far the single most common category marked on mediator disposition sheets. It was marked by mediators as 'very significant' in almost 25% of all cases (both settled and not).

d. credibility

The other major issue that concerns the relationship between the two sides is that of credibility, that is, whether either or both sides are presenting a believable claim. When lawyers in interviews spoke about credibility as an issue, they were often referring to their own client, as well as to the client on the other side.

Credibility was the factor marked most often as a barrier to settlement by both lawyers (42.5%) and clients (43.9%) completing the survey. Credibility may be perceived as an especially significant factor in early settlement discussions, particularly where expert appraisal (for example, medical reports) is not yet available (see also above at 6B). For example,

"we needed expert evidence before the session. If a professional appraisal had been available, there might have been a greater chance for settlement."

It is interesting to note that credibility was also the reason cited most often by lawyers interviewed as part of the control group (where the case was at least at the stage of pre-trial) as impeding settlement. This suggests its continuing importance beyond discovery, which is often characterised by lawyers as the point at which a full evaluation of credibility can be made.

At odds with these results, credibility was downplayed as a barrier to settlement by some lawyers in the ADR interview group. It was suggested instead that mediation is an ideal opportunity to make an assessment of the credibility of both the other side and your own client.

ii. complex legal or factual issues

Although earlier research⁶³ has suggested that there is a correlation between the propensity of cases to settle early and their degree of legal or factual complexity, no significant correlations between these items and case disposition were identified in interviews. However, both legal and factual complexity were suggested by lawyers as perceived barriers to settlement.

a. complex factual issues

Survey respondents were invited to check 'complex factual issues' as a reason for failing to settle. 33.6% of lawyers and 34.1% of clients marked this as a factor, somewhat higher than the same figures for those indicating that complex legal issues impeded settlement (below). This emphasis was reflected in interview data also. 19% of lawyers in the ADR interview group

indicated that complex factual issues frustrated settlement, while complex legal issues were mentioned by only 12% of this group.

'Factual complexity' may also be understood as 'different' characterisations of the facts of the case. Clearly different perspectives are likely to lead to differing characterisations of the 'facts'. As one lawyer put it,

"Their [both sides] understanding of the relevant facts was different."

b. complex legal issues

Survey respondents were invited to check 'complex legal issues' as a reason for failing to settle. 24.8% of lawyers and 21.2% of clients marked this as a factor. Several lawyers in the interview group suggested that where the law is uncertain, it is more difficult to obtain a settlement. Conversely, the fact that the law is reasonably settled in relation to unfair dismissal cases (at least in relation to a 'formula' for compensation) was suggested as a possible explanation for the relatively higher rate of settlement in these cases (see 3A, Tables One and Three).

c. more information needed to settle

22.9% of lawyers and 21.2% of clients stated that more information had been needed to reach a settlement. Take, for example, the statement that,

"this file was not mature enough for mediation."

This obviously reflects a view that referral came too early in the life of this file. It may also relate to the legal or factual complexity of the case (above). It may further reflect a lack of preparation by one or other side.

iii. the role of the DRO

The other major issue which emerged from interviews as a factor in the failure of mediation to achieve a settlement was the role played by the mediator. It should be noted that no parties suggested that the mediator was primarily responsible for the breakdown of the mediation. However, a small number indicated that they believed that the role played by the mediator was a contributory factor in the failure to strike a deal.

The most consistent comment made in this respect was that the mediator had not been sufficiently aggressive or forceful in pursuing settlement. This fits with remarks described earlier (see 4C and 5C above) about the role of the mediator and some discomfort, especially among the lawyer group, with the mediator acting as a neutral who will not give an opinion on the merits of a case. However, this point is somewhat at odds with some of the complaints made by clients about being put under pressure to settle, sometimes by the mediator (see 5C above).

It is important to recognise, of course, that a very different view of any 'pressure' or 'encouragement' to settle applied by the mediator may emerge from the accounts of those who did settle, compared with those who did not. Suffice to say that the latter group did in some cases suggest that the mediator might have played a more instrumental role in bringing about settlement.

One other concern raised by a small number of lawyers in interviews was that the mediator in their case was over-zealous in controlling the process, and did not allow sufficient space for counsel to speak privately with his or her client. For example, one lawyer complained that,

"I was unable to give my client frank legal advice in private."

This comment seems to relate to the criticism made by a small number of lawyers (above at 4C) that in some cases the mediator did not show sufficient respect for counsel's role. It may also reflect some misapprehension of the role of legal advice in the context of mediation.

E. summary of barriers to settlement

1. Where cases chose to opt out of the ADR Centre process, the most common substantive reason given was the complexity of the case (either legal or factual issues). It was sometimes suggested that later referral - for example after discovery - would be more appropriate.
2. Some defendants' lawyers who opted out articulated the view that there was no purpose to settlement discussions when their client was not prepared to accept liability.
3. A statistically significant number of those lawyers who stated that they would have *preferred* to opt out, were acting for defendants in cases which failed to settle at the Centre. This suggests a possible predisposition among this group to regard mediation as a waste of time.
4. The high rate of adjournments for the first mediation session is difficult to explain in light of the assertion by the majority of lawyers that the timing of referral afforded them sufficient opportunity to prepare for mediation. The adjournment rate may reflect a more general lack of orientation among the profession towards settlement discussions this early in the life of a file, and a misapprehension that the outcome of mediation will turn on the strength of their legal case.

5. Where cases came to a mediation session at the ADR Centre but failed to settle, the most common reason given was a 'lack of co-operation' by the other side. Proportionately more clients blamed the lack of co-operation of counsel for the other side; and proportionately more lawyers blamed the lack of co-operation of the other side's client. 'Lack of co-operation' was described as including delaying tactics, lack of adequate preparation to mediate, unrealistic expectations by clients which were sometimes reinforced by their lawyers, failure to present a range of reasonable options for settlement, and lack of authority to settle.
6. 'Credibility' emerged from survey data as the next most common barrier to settlement in cases which attended at the Centre but failed to settle. This reflects concerns about the availability of expert evidence needed to appraise the plaintiff's case. Conversely, in interviews some lawyers emphasised that mediations enabled them to better assess the credibility of both the other side and their own client.
7. Both lawyers and clients (but significantly more lawyers) in the survey group thought that actual hostility between the parties - and occasionally between the lawyers themselves - was a barrier to settlement.
8. In some cases the role played by the mediator was described as a factor in failing to reach a settlement. In these cases the mediator was generally characterised as not sufficiently aggressive in pushing for an agreement. Some of these comments suggest that the parties (both lawyers and clients) were not familiar with the role of a neutral in ADR.
9. A number of the perceived barriers to settlement (for example, the complexity of the legal or factual issues, an unwillingness to admit liability) may reflect a misapprehension by some lawyers of the focus of mediation, which is on interest based rather than rights based settlement.

PART TWO

EVALUATION DESIGN AND OBJECTIVES

1. TIMELINES

The evaluation was commissioned in May 1995 and scheduled to report by the end of November 1995. This timeframe meant that fieldwork had to be undertaken during the summer months, leaving September and October for data analysis and November for the writing of the final report and recommendations.

2. THE MANDATE AND OBJECTIVES OF THE EVALUATION

The key questions which the evaluation sought to answer were developed by Dr Julie Macfarlane, the Evaluation Director, Lisa Feld, of Stitt, Feld, Handy & Houston, and the Centre's Steering Committee, in particular Christine Hart, the Director of the ADR Centre and John Gregory, Counsel in the Policy Division of the Ministry of the Attorney-General. The questions that the evaluation was mandated to answer were:

Is the ADR Centre effective in generating early settlement?

Are cases referred to the ADR Centre more likely to settle earlier than cases in the remainder of the General Division? What does a statistical analysis tell us happens to a 'typical' General Division case, and how does this compare to the timelines and disposition of cases referred to the ADR Centre? Are certain case types and characteristics significant?

How satisfied are users - clients and counsel - with the service offered by the ADR Centre?

For example, do parties feel that the mediation process was a fair one? Would the parties use mediation again? What impact does referral to the Centre have on costs?

What are the barriers to settlement using ADR?

Why do some cases fail to settle? Again, are certain case types and characteristics (such as monetary value, relationship between the parties, case complexity) significant? How does the profession feel about the ADR Centre? Are clients involved in the ADR process (and any decisions taken about ADR)? Is referral before discovery a barrier to settlement in some cases?

Related to this question, why do some parties prefer to 'opt out' of ADR altogether, and what accounts for the large number of ADR adjournments⁶⁴?

Recognising that the pilot was being evaluated early in its history and that a relatively short period was available for the evaluation study (April - November 1995), several areas of potential interest for an evaluation were excluded at the outset.

- i. the evaluation was not planned as a cost-benefit analysis of the work of the ADR Centre⁶⁵. It was hoped that the evaluation could obtain some data on lawyer and party costing, and projected savings, in cases where settlement was reached⁶⁶. However there was no mandate to explore the cost-efficiency of the operation of the Centre in relation to the remainder of the General Division.
- ii. so-called 'longitudinal' questions could not be answered in this evaluation. These questions might include, for example, the mid to long-term impact of a service such as the ADR Centre on individual disputes (eg the extent to which the dispute recurred between the same parties); the impact on client and counsel attitudes towards dispute resolution (eg the number of legal actions commenced by any one plaintiff, such as a major insurer); compliance patterns; and the mid to long-term impact of an unsuccessful session at the Centre on the settlement of any one case.

Both i. and ii. above are important questions and should be explored in any later evaluation.

3. SOME STARTING ASSUMPTIONS FOR EVALUATION DESIGN

In planning the design of the evaluation the following assumptions were made at the outset:

A. most cases settle

It is already known that the vast majority - estimates range from 90 - 98%⁶⁷ - of civil disputes which are commenced as legal actions are settled short of the judgment of a court. It is assumed that a similar percentage of cases being referred to the ADR Centre would settle without the formal intervention there. The real question for an evaluation then is whether the ADR Centre encourages *earlier* settlement, saving both clients and the legal system time, money and other resources in the process.

B. adjudication remains the dominant model of dispute-resolution

In a common law culture the dominant model of dispute-resolution - for which lawyers are trained and which their clients expect - is that a third party will make a decision and impose that decision on the parties. That decision will be based on the relative merits of each side's position, a process commonly described as 'rights-based adjudication'. In this model lawyers characteristically make decisions on behalf of their clients since they have the special knowledge of and access to the dispute resolution system that their clients lack.

This cultural expectation is reflected in the attitudes of both lawyers and clients; for example lawyers rarely inform their clients about the possibilities of dispute settlement using mediation and clients are unlikely to request the intervention of a mediator. Efforts at settlement are characteristically letters of offer and counter-offer sent back and forth between the parties. It is this process of 'arms-length negotiation', or 'litigotion'⁶⁸, rather than a formal meeting with a mediator, that many lawyers feel most comfortable with⁶⁹.

What is important for an evaluation of a new approach to settlement is that these expectations and practices are likely to be reflected in the knowledge and attitudes of the legal profession, and their clients.

C. the impact of the timing and duration of the evaluation

Since the evaluation commenced less than one year after the opening of the ADR Centre it was evident that a number of 'teething problems', administrative and practical, would come to light. Further, it was anticipated that there could be some significant changes in the administration of the Centre during the period of the evaluation⁷⁰. One example is the change in the ratio of referral of cases out of the General Division pool into the Centre, to take account of changing estimates of total referral numbers⁷¹.

D. the mediator as a variable in evaluation

It is assumed from early studies and from personal experience that the skill of the individual mediators engaged is critical to the success of any pilot project. The personal style of each mediator is a variable throughout any evaluation process. However, the evaluation was not designed to include a performance review of individual mediators and this report does not comment on the work of individual mediators. Data from user interviews and completed questionnaires can however identify some of the key concerns expressed by ADR Centre users about the general role of the mediator.

4. EVALUATION METHODOLOGY

A. General design principles

i. combining qualitative and quantitative strategies for data collection⁷²

Some aspects of the ADR Centre's mandate can be appropriately evaluated via the collection and analysis of primarily quantitative data. Relevant quantitative data would include, for example, the volume of cases which settle, those which continue to trial, the timing of settlement, overall timelines from first filing to settlement, and so on.

However quantitative data often raises more questions than it answer. An evaluation of the success and efficacy of a new program and process requires other tools for data collection and

analysis. In searching for explanations of the apparent 'successes' and 'failures' of the program indicated by the quantitative data, qualitative methods (such as personal interviews and open-ended survey questions) are particularly appropriate. These methods can focus intensely on the detail of cases in order to identify and establish any significant patterns, both anticipated and unanticipated⁷³.

Qualitative data is especially appropriate to answer questions about party satisfaction with the ADR Centre process. Qualitative data is also essential to understanding the unique internal dynamics of a program. In a relatively recent program innovation such as the ADR Centre this becomes even more important, to ensure that the evaluator does not prematurely close down avenues of enquiry which might provide unanticipated explanations or answers.

The effect of combining quantitative and qualitative evaluation methods is to enhance the depth, breadth and hence the reliability of the final results of the evaluation⁷⁴. In effect this approach (along with data triangulation, below) acts as a 'double-check' on information and results. Qualitative data, such as information gleaned from interviews with parties and counsel, can be reinforced and expanded by quantitative data, which provides a broader context and framework for analysis. On the other hand, qualitative data can be used to develop explanations for any patterns emerging from the quantitative data.

ii. combining data sources for enhanced reliability⁷⁵

Three sources of data (detailed below) were combined to produce the final results of the evaluation. It is self-evident that combining data sources acts as a check on the accuracy and reliability of information and results. In addition this study utilised different types of data from different sources to develop a very comprehensive picture of the case study sample (below).

iii. identifying a comparison ('control') group

The ADR Centre was designed to enhance the process of dispute resolution in the General Division and not to stand alone as a dispute resolution alternative. Essentially its evaluation is an assessment of the impact of the ADR Centre experiment on the 'normal' patterns of settlement in the General Division⁷⁶.

As a consequence, the evaluation needed to examine not only cases in the 'experimental group' (cases referred to the ADR Centre experiment), but also some cases in a 'control group'; that is, cases which proceeded through the regular (or sometimes the case-managed) General Division process. In this way the evaluation is able to examine the attributes claimed for the ADR process and to compare them with those of the traditional court process⁷⁷.

The final reliability of evaluation data is significantly enhanced by the fact that cases are selected *randomly* from filings in the General Division⁷⁸ for referral to the ADR Centre. For example, if a majority of cases were self-selected for referral to the ADR Centre, this variable would have to be built into a comparison between this group and a 'control' group. Since referral to the

ADR Centre is by random assignment, the starting point for analysis of impact is the same for each group. For this reason, random assignment is sometimes described as the 'gold standard' of evaluation design⁷⁹.

The evaluation drew directly on a comparison or control group in the following ways.

- i. in analyzing the Sustain database, cases which had been through the ADR Centre to September 15th 1995 were compared with the same number of cases in the General Division.
- ii. in a random selection of individual cases referred to the ADR Centre as case studies, a comparison group of the same size and general characteristics (below) was drawn for a General Division control group.

The third strategy, the ADR Centre user questionnaire, was not set directly against a comparison group although there was scope for comparison of these results with control group data collected in interviews.

iv. *sample size*

The sample size varied in each case with the evaluation strategy employed.

The macro analysis of the Sustain database was undertaken using a sample of 2,500 cases in each group, experimental and control.

The user questionnaire was sent to 800 lawyers with copies enclosed for their clients. A target of 300 completed questionnaires was set to ensure statistically significant returns. This was easily exceeded; a total of 707 questionnaires were received.

Thirty cases from the ADR Centre, and a comparison group of 30 cases from the remainder of the General Division, were originally selected for the case studies. Some of these cases were replaced where the parties were unwilling to participate. A target of 150 total interviews with all four sub-groups (lawyers in the ADR experimental group, their clients, lawyers in the General Division comparison group, their clients) was set at the outset. Where significant potential variables are identified and controlled in the sample selection, verifiable trends are usually apparent after 10-15 personal interviews⁸⁰. By the end of the three month fieldwork stage a total of 143 interviews had been conducted, 112 with lawyers and 31 with clients. Both groups are adequate in terms of sample size for a detailed study in which so many variables (for example, case type, stage of proceeding) are controlled. The lawyer sample in particular is an excellent sample size for this type of detailed data⁸¹.

v. *sample selection*

This is dealt with below under each head of data collection.



B. Data collection sources and methods

Data was gathered and analyzed from three sources.

i. Sustain data

All General Division cases commenced in the Toronto region are entered into the Sustain database. All cases referred to the ADR Centre are also recorded on a (slightly modified) version of Sustain. Cases which are part of a case management stream are also identifiable as such.

Each case record held on Sustain includes a range of information on that case. Each record includes case information (case type, filing date and, where relevant, disposition date), party information (names of counsel and parties), documents filed to date, scheduled events to date (for example motions, pre-trial conference, trial) and their outcome.

The data contained in Sustain provides a fund of information for the purposes of evaluation. In this case it could be used to answer the following critical questions:

- * what are the mean and median timelines for the disposition of General Division cases? (those referred to the ADR Centre, case-managed, and other)
- * at what stage in the legal process does settlement tend to take place?
- * are there any significant case characteristics for those cases which do or do not settle?

These questions were asked in relation to Sustain records on all cases which were referred to, and disposed of (whether or not settled) via the ADR Centre from January 1 until August 30 1995. This was a total of 1460 cases.

For the purposes of comparison the same number of cases (1460) were drawn from Sustain records for the remainder of the General Division. This pool comprised all General Division actions⁸² commenced from September 15th 1992 to September 15th 1995⁸³. A computer program was written to randomly select 1460 cases from this pool. The program matched the case types appearing in the ADR Centre caseload in the month of June 1995; so for example where the ADR group included 17% wrongful dismissal claims, the same percentage of wrongful dismissal claims were included in the control group. 10% of the control group was pre-assigned to case-management cases (to reflect the percentage in the General Division at large). Cases were otherwise selected at random.

In addition, Sustain data was available to expand the information provided in completed questionnaire surveys about a particular case. By matching case numbers from completed questionnaires with their records on Sustain, it was possible to calculate, for example, how many questionnaire returns were received from lawyers or clients involved with wrongful dismissal cases, how many with breach of contract/negligence cases, what the monetary value of the case was, and so on.

ii. ADR Centre questionnaire survey

A questionnaire survey was developed directed at all ADR Centre users (past and present, counsel and client). In particular, this questionnaire sought to gauge user satisfaction with the process including referral procedures, the conduct of the ADR session and its outcome and other aspects of the Centre's operation. The evaluation attempted to assess the satisfaction of parties and counsel with the process of mediation and its outcome as they experienced it. Some doubts have been expressed in earlier studies about the validity of user satisfaction data, especially where users have not experienced the traditional court process and hence have nothing to which to compare their experience of ADR⁸⁴. However, in this study, most of the lawyer users and many of the client users (for example where the defendant was an insurer or a large employer in a wrongful dismissal action) had had previous experience of the court process. Some writers have suggested that a better way of evaluating ADR is to evaluate the quality of the settlements themselves⁸⁵. Here there was no independent evaluation of the fairness or the appropriateness of the settlements reached. This approach was ruled out by the agreed scope of the evaluation and the limited time period available. The focus instead was on the parties' reactions to involvement in a new and unfamiliar or only marginally familiar process, in terms of their satisfaction with both the process⁸⁶ and the outcome⁸⁷ of ADR. Copies of the client and the lawyer versions of the user questionnaire are attached at Appendix C.

The questionnaire was developed using prototypes from a number of other evaluations of court-based mediation services (for example, the work of Professors McEwen and Mainman on small claims court mediation in Maine⁸⁸, the work of Professor John Barkai on court-based arbitration in Hawaii⁸⁹, and the work of Professor Joseph Tomain in evaluating the work of the Ohio Center for Dispute Resolution⁹⁰).

The questionnaire included some 'intentional redundancy', that is, repeat questions to test the accuracy and authenticity of responses. It also tried to be as concise and compact as possible in order to enhance response rate. Most of the questions looked for one of a number of fixed responses, and in this respect the work of earlier studies (above) and the pre-testing process (below) was critical. A Likert scale⁹¹ was used in many places to gauge a range of satisfaction. In addition some spaces were left open for further comment. These responses were later analyzed and coded (below):

The questionnaire was pre-tested by lawyers in the Evaluation Advisory Group and some members of the Centre's Steering Committee. Their input was invaluable and many changes were made as a result.

The questionnaire was mailed (enclosing a stamped return envelope) to all lawyers who have attended at the Centre (approximately 850) from the first date on which referrals were made until June 30th 1995. The mailing relied upon information contained in Sustain as to which cases actually met at the Centre. This was largely accurate but there were some errors.

Each questionnaire was numbered in order that it could be matched to data held on Sustain (above). Where the lawyer had attended at the Centre on more than one file, she/he was asked to complete the questionnaire in relation to the file on which she/he most recently attended at the Centre. The information contained in Sustain giving the date of the most recent session at the Centre was relied upon in order to number and match information in these cases. This is assumed to be largely accurate but there may be some errors.

Each mailing to a lawyer enclosed a questionnaire for their client, also containing a stamped return envelope, and in the cover letter the lawyer was asked to address and send on the questionnaire to their client.

It was not possible to mail the questionnaire directly to the client for two reasons:

- i. their names and addresses rarely appeared in the Sustain database
- ii. it was considered inappropriate to contact clients independently of their lawyers

From July 24th 1995, the same questionnaire was given to each party at the end of his or her sessions at the ADR Centre. This was facilitated by the mediators who explained to parties the purpose of this new questionnaire and encouraged them to complete it. Completed questionnaires were inserted in an envelope and the case number written on the outside, to allow for matching between questionnaire information and data held on Sustain (above).

A database to input and analyze the questionnaire data was developed on SPSS⁹² by Trevor Richards. This programme also allowed for the cross-reference of Sustain data to returned questionnaire surveys for specific cases; and, where the case was also part of the case study sample, to data from personal interviews with counsel and clients.

iii. Case studies

The third strategy for gathering data involved case studies of up to 30 cases which had been through the ADR Centre (the 'experimental' group), and 30 cases from a control group (ie from the pool in the rest of the General Division including case-managed cases).

The purpose of this focus on selected cases was to gain a fuller understanding of what makes ADR work or not for these parties, the ways in which parties move towards settlement, and the attitudes adopted by counsel towards the use of ADR⁹³. The interviews were also used to obtain more 'sensitive' information, such as billable hours expended on the case at various stages.

In developing the sample pools for the experimental and control group case studies, the following⁹⁴ was taken into account in order to maximise the relevance and authenticity of the sample:

- a. cases in the sample pool for both the experimental and the control groups were matched to the respective proportions of case types going through the Centre; that is, one third wrongful dismissal, one third breach of contract/negligence, and one third 'other' (including property disputes, wills and probate, medical malpractice, etc);
- b. one tenth of the cases in the control group pool were from the case management stream (one in ten cases are presently selected for case management);
- c. for cases in the experimental pool, half were 'settled' and half were 'withdrawn' (not settled). This matches approximately the dispositions achieved in the full caseload (of cases that actually attended at the Centre) in May 1995, when the sample was drawn;
- d. both pools were limited to cases which had either been to the ADR Centre or to a pre-trial⁹⁵ in March, April, or May 1995.

From these pools, a total of 60 cases (30 experimental and 30 control) were randomly selected either manually or using a computer programme.

A semi-structured format was designed for interviews - with either client or counsel - in both the experimental and the control groups. The interviews were designed to go 'underneath' the primarily quantitative information gained from questionnaire data and data held on Sustain (above). The interview formats for clients and lawyers from both the control and the experimental groups are attached at Appendix D. All four formats were developed with the maximum of overlap to allow for cross-referencing between the different groups; for example, all subjects in each group are asked questions about the nature of the conflict, the complexity of the case, motives for bringing suit, billable hours to date and an estimate of billable hours if the case proceeded to trial. However each format obviously reflected some differentiation particular to that subject group.

These instruments were pre-tested (especially for validity⁹⁶) with the assistance of the Evaluation Advisory Group and some members of the Steering Committee. Once again these instruments were based on the most recent evaluations conducted of court-annexed ADR facilities in other parts of North America (see above).

Where a case was selected for a case study, contact was made with counsel as listed in Sustain. The purpose of the study and their role in it was explained and their co-operation sought for a personal interview (or in some cases where the travelling time would have been in excess of one hour each way, a telephone interview).

There were few refusals from lawyers in either the control or the experimental group (although scheduling an interview during the summer months when many people are away on vacation was sometimes difficult). However, some difficulties arose in obtaining contact details for clients from their lawyers. Reasons given included the following: my client would have nothing to add to what I have told you; my client is upset about the outcome of this case and would not want

to talk about it; my client would be concerned if they knew that I was talking about their case; my client is out of the country, has moved away, is very busy; the person within the client company who knows most about the case has moved to another company.

Two Windsor Law students (Irfan Syed and Patricia O'Reilly) were trained to conduct interviews with both experimental and control group subjects and undertook the bulk of the interviews. Some interviews were conducted at regular intervals by the Evaluation Director to ensure the validity of the interview format.

A database to input, code and analyze interview data was developed on SPSS by Christine Brown of the University of Western Ontario's Library and Information Science doctoral programme. Interview data was first analyzed and coded⁹⁷ (with regular checks for relevance and authenticity⁹⁸) and then entered into a SPSS database. This data could then be analyzed and also matched with Sustain data for each case and, where available, questionnaire data for that case also.

In addition, input was specifically solicited from two further sample groups of cases which had been referred to the ADR Centre. The user questionnaire (above) was clearly aimed at those who had attended at the Centre. The case study group for the Centre (above) was also comprised of cases which had been dealt with at the Centre. The two remaining groups from which comment was sought, via telephone interviews, focus groups and written communication, were

- i. counsel who had 'opted out' of a session at the ADR Centre; and
- ii. counsel whose cases settled *after* referral to the ADR Centre but *before* an ADR session.

In the case of group (i), responses were tabulated to develop a comprehensive list of given reasons for choosing the opt out course.

In the case of group (ii), counsel was asked to evaluate the impact, if any, of an ADR referral on the settlement outcome⁹⁹.

PART THREE

CONCLUSIONS AND RECOMMENDATIONS

Many possible implications flow from the results of the evaluation. Given the constraints of time, not all of them will be captured below. There may be further ways in which the information collected by the evaluation can be used to support particular conclusions or policy planning.

Making ADR available to civil litigants

1. Evaluation data suggests that there is dissatisfaction amongst both lawyers and their clients with the way in which the civil courts handle the resolution of disputes. Only 5% of lawyers state that their client 'always' receives value for money in litigation, and a slim majority agree that the client receives value for money 'in most cases'. In particular it was apparent from interviews with clients in the control group (cases which had not been referred to the ADR Centre) that the traditional litigation process gives rise to many frustrations, the most significant of which are delays and the overall costs of legal action.

It is equally clear from the data that there is strong and broad approval for the availability of ADR as a part of the litigation process. This was apparent in the ratings by lawyers and clients of their personal experiences at the ADR Centre, as well as from their responses when asked about the use of ADR in general.

The provision of an ADR step in the civil litigation process appears, therefore, to serve a real need (for the speedier, less expensive resolution of disputes) and is generally welcomed by both counsel and clients.

2. Where cases in the General Division settle before trial, settlement generally takes in excess of 200 days (and sometimes twice or three times longer). Where cases are referred to, and settle at, the ADR Centre, time to settlement is reduced to slightly more than 120 days. According to lawyers surveyed and interviewed, settling earlier lowers costs to clients. The mandate of the evaluation did not include an analysis of cost savings to the justice system achieved through ADR. However, it seems likely that removing a case from the system in 120 days, instead of 200 or 300 days, reduces the overall cost of management of the system in the long run.
3. Settlement before discovery reduces both the number and amount of cost items. Fewer events in the life of a law suit reduce costs to both the user and the taxpayer. Evaluation data shows that the ADR Centre has been successful in increasing the settlement rate for cases between the filing of a statement of defence and discovery. 13% of cases for which a statement of defence has been filed in the Case Management stream¹⁰⁰ settle before discovery. 25% of cases referred to the ADR Centre following filing of a statement of defence are settled at the Centre. Another 17% of cases referred to the Centre settle

defence are settled at the Centre. Another 17% of cases referred to the Centre settle before mediation¹⁰¹. Evaluation data suggests that in some of these cases, referral to the Centre may have provided a catalyst to settlement prior to mediation.

Recommendation One

It is in the interests of parties that ADR continue to be available. Referral to ADR can save parties both time and money and enhance party satisfaction with the civil justice system. It seems likely that the more rapid settlement of some cases achieved through referral to ADR represents a benefit to the civil justice system, although a final conclusion on this point requires further work on internal justice system costs.

Mandatory referral to ADR

4. The evaluation did not find any significant opposition among lawyers or litigants to the mandatory nature of ADR in the pilot programme. Indications of low take up rates from voluntary programmes¹⁰² suggest that the mandatory nature of referral (with the possibility of 'opt out') should be continued.

There were some concerns raised about the suitability of particular types of cases for ADR. Most often mentioned were cases considered to be especially complex. Data from the evaluation indicates that such cases are, in the estimation of lawyers themselves, comparatively unusual. Other examples of case characteristics highlighted by lawyers as unsuitable for early ADR include cases where there is a serious issue of credibility, or those which involve outstanding counter-claims or third party claims.

The area of law in which a claim is brought was not considered by lawyers to be as significant in evaluating the suitability of a case for early ADR. Although it appears that mediation is proportionately more successful in wrongful dismissal cases than in other groups of cases coming to the ADR Centre, the data does not suggest that any of the case types currently referred to the ADR Centre are not susceptible to mediated settlement. Settlement has been successful at the Centre across a wide range of case types.

As a consequence, there appears to be no argument for screening out cases by area of law. Screening out cases by internal case characteristics (such as legal or factual 'complexity', above) seems unrealistic. Such a process would be time-consuming and would risk both unreliability and rigidity. The screening function is better left to a well-informed Bar. However, it may be appropriate to include in information provided to the Bar some discussion of characteristics which may make a case more or less suitable for early ADR. This would also address the problem of misapprehensions about the purpose of mediation, which may lead some counsel to assume that their case is unsuitable when it may in fact benefit from the process.

Recommendation Two

Referral to ADR should continue to be on an 'opt out' basis. Further education and information should be provided to the Bar to ensure that lawyers participating in mediation are sufficiently familiar with the objectives of mediation and are better able to recognise how each case may (or less often, may not) benefit from mediation at an early stage.

Timing of referral to ADR

5. The evaluation found some limited criticism of the timing of referral to the Centre, which presently takes place after service of the first statement of defence. The majority of ADR Centre users expressed no difficulty with the timing of referral. Some lawyers and clients explicitly recognised the value of early referral in saving costs and time (see above, paragraph 2). It is clear that early settlement has substantial benefits for clients.

Recommendation Three

Cases should continue to be referred to ADR after the filing of the first statement of defence.

6. Two possible exceptions might be made. In cases where two or more parties join suit, it may be appropriate to defer referral of a case until close of pleadings rather than after the service of the first statement of defence. It may also be appropriate to allow deferral on request for some *exceptional* cases (for example those where counsel can identify specific items of evidence not yet available and which counsel considers essential). A court officer could be asked to make this assessment. Deferral could be until a specified future date when the case would return to ADR.

The relationship of the Court to the provision of ADR services

7. Mandatory referral should be predicated upon a continuation of the relationship between the ADR pilot and the Ontario Court (General Division). The ADR Centre model (a Court office located away from the Courthouse) was evaluated very positively by both lawyers and clients. It is not known what response would have been given had the service, for example, been located in the Courthouse itself, or alternatively, operated by a private ADR firm. However, a reasonable interpretation of the very positive evaluations of the Centre's service and facilities is that its supervision by the Court ensures its credibility in the eyes of clients and counsel.

8. The provision of ADR under the auspices of the Court also ensures the accountability of the service to the Court itself, and through the Court to the public. The fact that many hundreds of lawyers and clients were willing to complete questionnaire surveys and take part in interviews in the course of the evaluation suggests that the accountability of the service is important to them.
9. Possibly the most important single aspect of accountability here is in relation to the standard of mediation services offered. The evaluation found that clients' and lawyers' perceptions of the mediator him or herself were critical to, and largely inseparable from, their evaluation of the entire process. This adds to the importance of ensuring a high quality of mediators and a means of quality control, especially given the current absence of formal professional accreditation procedures for mediators in Ontario. This situation may alter in the next few years, but for the present it seems unavoidable that the Court should play some role in approving mediators and monitoring their performance in civil cases that have been mandatorily referred.
10. The evaluation found that many clients and some lawyers were not familiar with the process of mediation before their session at the ADR Centre. This was apparent in many of the comments made by lawyers and clients in interviews. Many clients said that they came to mediation unclear about the purpose or the process of the meeting. Comments by some of the lawyers who participated at the Centre¹⁰³ suggest that mediation is a new experience also for some members of the Bar. An unfamiliar process, especially one that challenges traditional assumptions about the format and objectives of settlement discussions, can be intimidating, and misapprehensions may flourish.

The overall supervision by the Court of future ADR services would serve to build confidence in these new processes, and to reinforce their worth to the profession.

Recommendation Four

If mandatory referral is to continue, as recommended above, the Court should continue to supervise any future ADR service and take responsibility for quality control of ADR services provided to litigants.

Choice of mediator

11. It has already been stated (above paragraph 9) that the parties' perception of the quality of the available mediators is critical to their evaluation of the service itself. Assuming the continuation of mandatory referral to ADR, it seems appropriate to offer litigants a choice of mediator. This would allow parties to choose a mediator they believe has and will work for them. As the number of 'repeat customers' at an ADR service increases, the question of choice is likely to become a growing issue. Choice could be offered in a number of ways; for example, a choice among mediators employed by the Court,

choice from a list of rostered mediators contracted by the Court to provide services, or choice of a private mediator who is 'approved' by the Court. Whatever arrangement is adopted, the Court should remain in a supervisory relationship with the service and in a position to monitor the quality of mediation and other ADR services being provided to litigants.

Recommendation Five

Some element of party choice of mediator should be built into the future provision of ADR services, under the continued supervision of the Court.

Continued education and information (i) for lawyers

12. The results of the evaluation demonstrated that there is a wide range of experience amongst the profession in relation to the use of ADR. Interviews revealed that counsel, in advance of attending at the Centre, held a wide range of views about the usefulness of mediation ranging from the very optimistic, to the very sceptical. Evaluation data illustrates several ways in which the lack of experience of some lawyers with mediation may have an impact on the process itself.¹⁰⁴

It seems likely that as lawyers become more familiar with mediation, their preparation for, and participation in, the process will become more effective. This may be a significant factor in increasing the likelihood of settlement. It may be part of the explanation for the relatively high rate of settlement and low rate of 'opt out' for wrongful dismissal cases, which have been referred to the ADR Centre at a higher ratio than other case type since the beginning of the pilot and hence produce more 'repeat customers' than any other substantive area.¹⁰⁵ Some of the present 'barriers' to settlement - such as lack of preparation, unnecessary delays and adjournments, and the assumption that the mediation will be a waste of time¹⁰⁶ - may be lowered by enhanced information provided to the Bar and increased opportunities for professional education in this area.

13. Education and information on how to represent a client in ADR may also go some way to alleviating the current problem of high adjournment rates. There is some evidence to suggest that the adjournment rate at the ADR Centre reflects hesitancy on the part of lawyers to deal with settlement options at this early stage of litigation. The timing of mediation at the ADR Centre is scheduled to occur earlier than settlement ordinarily occurs in the 'typical' litigation matter. A solution to the problem of adjournments may require a significant reorientation of the profession to the use of mediation for settlement discussions, where interests rather than rights are the focus. In an interests-oriented approach one may be ready to settle earlier than in a rights-oriented system.

Recommendation Six

Efforts should be made by the Bar and by the Court to ensure the better education of the profession on the use of, and means of participation in, ADR processes. An obvious vehicle for this would be Continuing Legal Education programs.

Continued education and information (ii) for clients

14. The evaluation has pointed clearly to the lack of information on ADR made available by lawyers to their clients, and to clients' frequent lack of readiness for the mediation process. Mediation is intended to be a process in which the client plays a significant role and contributes directly to the exploration of options based on interests. This can only occur if the client is fully briefed beforehand and has some sense of what to expect, and what is expected of him or her, in a mediation.

The revised Practice Direction ((1995) 24 O.R. (3d) 161) is a response to these concerns. The success of this measure in providing comprehensive information directly to the client needs to be monitored.

Recommendation Seven

Efforts to ensure that clients receive information in advance of a mediation session and participate fully in that meeting should be continued. Any such effort should be monitored to ensure that this objective is met.

FOOTNOTES

1. In addition, all wrongful dismissal claims are referred to the Centre. This ratio of referral has been in operation since August 1 1995.
2. For example, just ten in the month of August 1995.
3. This survey group corresponds approximately to the overall breakdown of case types referred to the Centre. See below at 3A(i).
4. The approximately 50% settlement rate for cases that actually attend at the Centre has remained fairly consistent throughout the life of the pilot. See also below at 3A(i).
5. For detail on the selection of the case study cases and the controlling and matching of key variables, see Part Two, at 3B(ii).
6. Where key variables have been identified and are already controlled in sample selection, qualitative data collected via personal interviews is expected to show verifiable trends after 12-15 interviews. See also Miles, M. & Huberman, A.M. Qualitative Data Analysis : An Expanded Sourcebook Sage 1993 especially 29-30.
7. That is, approximately half of cases attending at the Centre resulted in settlement. Figures for May 1995 did not break down cases beyond settled (in full or part) and not settled. Later figures break down cases into further groups, that is, 'settlement imminent' or 'second mediation session scheduled'.
8. Scheduling Co-ordinator, ADR Centre.
9. For the period 1 January 1991 - 30 August 1995.
10. See above at page 1 and note 1.
11. The corresponding figure for cases reported on in the surveys which did not settle at the Centre was 183 days.
12. The level of first session adjournments is currently running at 46% (figures for September 1995).
13. See Clarke, S., Ellen, E. & McCormick, K. in their study of court-annexed mediation in North Carolina. See Court-Ordered Civil Case Mediation in North Carolina : Court Efficiency and Litigant Satisfaction Institute of Government, University of North Carolina 1995 (hereinafter Civil Case Mediation in North Carolina).
14. This time period was selected in order to ensure a large pool of cases that had sufficient time to reach settlement or resolution at trial.

15. This mirrors the percentage of cases in the General Division which are placed in the Case Management stream.
16. Concerns over the accuracy and completeness of data entry in the sample control group meant that this level of analysis was not considered worthwhile.
17. What is apparently a *longer* time to case disposition for Case Management cases in the 'other' category, compared with General Division cases in the 'other' category, may simply be a result of more cases in the latter group recorded as disposed of before the filing of a statement of defence (see 3B(ii) below). However reporting on document filing seemed to be inconsistent throughout the control group (see also note 16 above).
18. With thanks to Liz Melnychuk, User Analyst, Courts' Administration, Ministry of the Attorney-General.
19. Figures for the period December 1991 to September 1995.
20. Data for the period December 1991 - June 1995.
21. 29% of the total cases referred to the Centre from January 1 until September 30 1995 settled or partially settled there. A further 15% settle after referral but before mediation. See above at Table One.
22. This accords with the findings of the Civil Litigation Research project (CLRP), described in Trubek, D., Sarat, A., Felstiner, W., Kritzer, H, and Grossman, J. 'The Costs of Ordinary Litigation' 31 UCLA LRev (1983) 72 (hereinafter 'The Costs'). This study found that there was a proportionally higher return to clients whose lawyers invested more hours in settlement activity (at 112 - 115).
23. Assuming a fee of \$200 an hour where the estimate was given in billable hours rather than as a dollar amount.
24. The figures provided above at 3B(ii) suggest that in fact probably slightly more of these cases would have settled before or after discovery (at least in the Case Management stream), that is, later than the surveyed lawyers estimated; and somewhat fewer would have actually settled at pre-trial than the lawyers estimated.
25. The difference between the first figure (hours to date) and the second (hours through to trial) is smaller for cases in the control group, because these cases were included in the study when they were already further along in the process - at or after the stage of a pre-trial hearing - than the ADR cases (at or shortly after filing of first statement of defence).
26. Civil Justice Review (Ontario Court of Justice, Ministry of the Attorney-General) First Report, March 1995, Table 3 'Cost of the Typical Civil case to Litigant' (at 144)
27. See 'The Costs' above note 22 at 97.

28. See 'The Costs' above at note 22 at 95-96.

29. See for example Galanter, M. 'Why the 'Haves' Come Out Ahead : Speculations on the Limit of Legal Change' 9 Law and Society Review (1974) 95 (hereinafter 'The Haves'). However the CLRP (above Trubek et al. 'The Costs' at note 22) found no significant differences in lawyers time invested and outcomes between individual and organisational parties.

30. See McCauley, 'Non-Contractual Relations in Business: a Preliminary Study' 28 Am Soc Review (1963) 55 for a discussion of the impact of a previous relationship or an important future relationship on settlement.

31. The total breakdown of monetary groups were \$0 - \$24,999; \$25,000 - \$49,999; \$50,000 - \$99,999; \$100,000 - \$999,999; and \$1,000,000 and over.

32. See also Barriers to Settlement at 6 below.

33. It was unclear whether clients understood the difference between a 'formal' and an 'informal' offer to settle. It was also not clear that all lawyers had the same understanding of these terms. "Offer to settle" is used here to describe the process which under the Rules of Civil procedure will impact on future orders as to costs (Rule 49, Ontario Annual Practice 1995-6).

34. See also Barriers to Settlement at 6 below.

35. See Galanter, 'The 'Haves' at note 29 above.

34. This probably reflects the fact that the interview group were drawn from cases which were referred to the Centre between March and May 1995, whereas surveys were completed and returned by lawyers up until September 15 1995.

35. For a full breakdown of these results see back at 3C.

36. For full breakdown of these results see back at 3C.

37. The exception was the question about mediation revealing facts about the case that helped move the parties towards settlement. 33.3% of lawyers agreed or strongly agreed with this statement; 33.8% disagreed or strongly disagreed. However the 'strongly disagree' group was comprised significantly of lawyers who cases did not reach settlement at the Centre. See also below at 4C.

38. 75.8% of client respondents said that they agreed or strongly agreed that the settlement was fair and 21% were 'neutral'. See also below at 5B.

39. The same question was asked of lawyers interviewed as part of the control group, whose cases had settled before trial. The majority of these lawyers (76.9%) also said that they did not expect to get any better result from a trial. Those who said they might have anticipated a higher monetary award at trial repeated the point made above by the experimental group, that time and

legal costs would have outweighed this advantage to the client. Presumably under all but exceptional circumstances, settlement will only take place at the recommendation of counsel, because it assumes that she or he can justify the decision to settle at that amount.

40. Overall lawyer satisfaction with the service provided at the Centre was in fact significantly higher than that of the client group (see below at 5C).

41. The percentage stating that they would use private ADR services in the future was significantly higher in the client group (85.3%) than in the lawyer group. See below at 5B.

42. See note 11 above.

43. (1995) 24 O.R. (3d) 161

44. (1994) 16 O.R. (3d) 481

45. Required by the Practice Direction to be submitted to the Centre by counsel for both sides seven days before the scheduled mediation session.

46. 49% of lawyers said that they forwarded ADR Centre materials to their client, while 36.8% of clients reported that this happened. See below at 5C.

47. 'Med/arb' is a process which commences as the mediation of a dispute by a neutral third party, but if the mediation is unsuccessful, the third party assumes the role of an arbitrator and imposes a decision on the parties. The common criticism made of med/arb is that it requires the mediator to 'switch hats' mid-way through the process. See for example Pruitt, D., McGilludy, B., Welton, G.L. and Fry, W.R. 'Process of Mediation in Dispute Settlement Centers' in Kressel, K. and Pruitt, D. (eds) Mediation Research Jossey Bass 1989 at 368.

48. Some ENE is carried out at the Centre and parties may request a judge to be available for this purpose. Only a very small number (for example a total of ten during August, 1995) have taken place.

49. I am grateful to Sylvia McMechan for this point.

50. This was significantly higher than the same figure for the lawyers group which was 75.9%.

51. It is noteworthy that control group interview data also records clients complaining of pressure being put on them to settle, and here they are clearly speaking of their lawyers.

52. Comments made by clients during those interviews reflected some lack of understanding and uncertainty about various elements of the legal process and belie the confident assertion of understanding 'everything'. See above at 3E.

53. See for example, Baruch Bush, R. and Folger, J. The Promise of Mediation Jossey-Bass 1994 especially chapter six.

54. I am grateful to Sylvia McMechan for this point.

55. See also note 11 above.

56. (1995) 24 O.R. (3d) 161 at para 4.6.

57. This fits with the disproportionate number of *defendants*' lawyers who said that they believed that the case would have terminated before discovery without the intervention of the ADR Centre. See above at 3C.

58. See above at note 56.

59. In the course of interviews with lawyers and clients in the ADR group.

60. If the figures for 'lack of lawyer co-operation' (24.8%) and 'lack of client co-operation' (36.9%) from the survey results are added together, they are very close to the figure for 'lack of co-operation by the other side' (person unspecified) produced from the interviews. This high number of lawyers in the interview group who emphasise lack of co-operation stands in contrast to clients who were interviewed, who emphasised hostility between the two sides as far more significant and made little mention of lack of co-operation.

61. Neither lawyers nor clients interviewed as part of the control group indicated that there was much in the way of actual hostility between the parties, although both spoke of the failure of the other side to co-operate in settlement discussions. It could be that the lack of a face-to-face meeting (as in mediation) reduced the extent to which outright hostility was seen as preventing settlement.

62. Data on mediator disposition sheets is taken from the analysis completed in November 1995 and dating from May 1995. Thanks to Jennifer Wyatt at the ADR Centre.

63. See for example, Trubek et al. 'The Costs' above at note 22 at 95. See also Finkle, P. and Cohen D. 'Consumer Redress Through ADR and Small Claims Court: Theory and Practice' 13 Windsor Yearbook of Access to Justice (1993) 81, where the authors argue that 'technical type' cases (where the facts are in dispute) should be diverted to ADR, while 'legal type' cases where legal issues are in dispute should continue to be dealt with by the courts.

64. See note 12 above.

65. A cost-benefit analysis here would involve a detailed breakdown of party and/or system costs for the disposition of a case through the General Division, compared with the disposition of a case via the ADR Centre. This data could then be considered alongside the potential benefits - for example time-saving, satisfaction with the outcome and other identified variables - of settlement via ADR. See for example Schiller, M. A Cost Analysis of the Dept of Labor's Philadelphia ADR Pilot Project, US Dept of Labour 1993; and for a costs only analysis, see Crosby, D. The Use of Mediation in Settling Injury Claims, Insurance Corporation of British Columbia 1995.

66. So-called 'internal' costs as compared with the 'external' or system costs of litigation. This data was sought in personal interviews with counsel. In addition, the evaluation used the estimate made by the Civil Justice Review (above note 26) of the average costs of a General Division case (at 144) as a benchmark for internal costing and consequent savings, if settlement were reached at any stage before trial (above at Part One 3C).
67. See for example, Menkel-Meadow, C. 'For and Against Settlement : Uses and Abuses of the Mandatory Settlement Conference' 33 UCLA LRev (1985) 485; Galanter and Carlill, 'Most Cases Settle' above note 30 at 1340-41; and Trubek et al. 'The Costs' above note 22 at 86.
68. An expression first coined by Marc Galanter in 'Worlds of Deals : Using Negotiation to Teach about Legal process' 34 J. Legal Educ. (1984) 268.
69. This point is developed in Clarke et al. Civil Case Mediation in North Carolina above at note 13 at 5.
70. This point is made by Rolph, E. & Moller, E. in Evaluating Agency ADR Programs: a User's Guide to Data Collection and Use, Rand Institute for Civil Justice, 1994 at 2 (hereinafter A User's Guide)
71. At the outset of the pilot, two cases in ten (plus every other wrongful dismissal action) were automatically assigned to the ADR Centre. In April 1995 this ratio was raised to eight in ten cases. The level was revised again in August 1995 and is now four in ten cases, plus all wrongful dismissal actions.
72. Sometimes described as 'methodological triangulation'.
73. See Patton, M. Qualitative Evaluation and Research Methods Sage 1990 (hereinafter Qualitative Evaluation and Research) and Rolph & Moller, A User's Guide (above note 70) at 5.
74. An evaluation strategy or instrument is reliable to the extent that, in a given situation, it produces the same results repeatedly. Combining quantitative and qualitative methods in search of answers to the same questions enhances the reliability of results. See Ross, P. & Freeman, H. Evaluation : A Systematic Approach SAGE 1993 at 230.
75. Sometimes described as 'data triangulation'.
76. For a discussion of what is sometimes described as 'impact' assessment, see Ross, P. & Freeman, H. Evaluation : A Systematic Approach SAGE 1993 at chapter five.
77. Tyler, T. 'The Quality of Dispute Resolution Procedures and Outcomes : Measurement Problems and Possibilities' 66 Denver University Law Review (1989) 419 at 421 (hereinafter 'The Quality of Dispute Resolution').

78. Once certain types of cases had been excluded from the pool ie applications, family matters, motor vehicle, debt collections, construction liens.
79. 'A User's Guide' above note 70 at 8.
80. See Miles, M. & Huberman, A.M. Qualitative Data Analysis : An Expanded Sourcebook Sage (1992) at 29 (hereinafter Qualitative Data Analysis).
81. See for example Miles & Huberman, Qualitative Data Analysis above note 80 at 29-30.
82. Excluding those which would not have been eligible for referral to the ADR Centre (see note 78 above).
83. A period of three years was chosen because it was anticipated that two to three years was a typical period over which a General Division claim might be processed from filing to disposition.
84. Tyler, 'The Quality of Dispute Resolution', above note 77 at 432-433.
85. Galanter, M. & Carlill, M. "Most Cases Settle" : Judicial Promotion and Regulation of Settlements' (hereinafter 'Most Cases Settle') 46 Stanford LRev (1994) 1340 at 1353-1359. Galanter and Carlill also assert that research suggests that those who receive the least in monetary settlement terms are often the most satisfied with the process and its outcome. He argues that this demonstrates differential expectations rather than the 'success' of ADR.
86. A measure of quality sometimes described as 'process-integrity' ie matching the form and fulfilling the potential of the dispute resolution method. See Baruch Bush, R. 'Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments' 66 Denver University Law Review (1989) 335 at 338 (hereinafter 'Defining Quality in Dispute Resolution').
87. Baruch Bush, 'Defining Quality in Dispute Resolution' above note 86 at 339; a measure of quality sometimes described as 'goal furtherance', that is, how far the process furthers the valued ends of the participants.
88. See McEwen, C. & Mainman, R. 'Small Claims Mediation in Maine : An Empirical Assessment' 33 Maine Law Review (1981) 244. Thanks to Professor McEwen for kindly sending me copies of the instruments used in this study.
89. Thanks to Professor Barkai for kindly sending me copies of the instruments used in this study. See Barkai, J. & Kassebaum, G. 'Using Court-Annexed Arbitration to Reduce Litigant Costs and to Increase the Pace of Justice' 16 Pepperdine Law Review (1989) 43.
90. Thanks to Professor Tomain for kindly sending me copies of the instruments used in this study. See Tomain, J. & Lutz, J.A. 'A Model for Court-Annexed Mediation' 5 Ohio State Journal on Dispute Resolution (1989) 1.

91. A Likert scale asks for responses along a scale of 5 or 7 items.
92. The Statistical Package for the Social Sciences.
93. Stake, R. 'The Use of Case Studies' in Denzin, N.R. & Lincoln, Y. (eds) Handbook of Qualitative Research Sage 1994 at 236.
94. Described as 'matched (quasi-random) sampling'. See Patton, Qualitative Evaluation and Research above note 73 at 100-106.
95. The appropriate comparison between cases going to ADR and cases in the traditional court system is not between cases resolved at ADR and those resolved at trial; but between ADR cases and cases in the process of formal or informal bargaining which leads up to trial (see also Tyler, 'The Quality of Dispute Resolution' above note 77 at 433). Of the control group sample some cases had settled, some were going to trial and a few had actually been to trial by the time we interviewed the parties. However in each case the interview focused on the process of bargaining leading up to trial. The selection pool was limited to cases which were already some way along in the bargaining process, that is, cases that had been to or were scheduled for, pre-trial, an event which was the closest equivalent to a mediation session in providing a formal settlement opportunity (this at the suggestion of Mary Thompson, from the Evaluation Advisory Board).
96. 'Validity' is the measure of the appropriateness of the question in relation to the given professional and practical context.
97. On coding qualitative data, see generally Patton, Qualitative Evaluation and Research above note 73 at 306-336.
98. For a description of 'good practice' in verification processes, see Huberman, A.M. & Miles, A.B. 'Methods of Collecting and Analyzing Empirical Materials' in Denzin, N.R. & Lincoln, Y. (eds) Handbook of Qualitative Research Sage 1994 at 436-437.
99. Clarke et al. Civil Case Mediation in North Carolina above at note 13, suggested that referral to mediation had an indirect effect on case settlement where cases managed to settle before their scheduled date.
100. These figures are not available for the remainder of the General Division. See Part One 3B above.
101. These figures from the sample group of 1460 ADR Centre cases (Part One at Table Four). The corresponding figures for the entire ADR Centre caseload from January 1 - September 30 1995 are 15% cases settled before ADR, and 29% of cases settled *both in full and in part* at the Centre (Part One at Table One).
102. See for example the review in Pearson, J. 'An Evaluation of Alternatives to Court Adjudication' 7 Justice System Journal (1982) 420 especially 427-28. See also Dunworth, T. and Kakalik, T. 'Preliminary Observations on the Implementation of the Pilot Program of the Civil

Justice Reform Act of 1990' 46 Stanford LR (1994) 1303 where the authors discuss the impact of more and less 'aggressive' strategies for the case management of cases in ADR pilot programs (at 1336); and see Brazil, W. 'A Close Look at Three Court-Sponsored ADR Programs' U. of Chicago Legal Forum (1990) 303, at 341-342 (very low numbers of cases volunteering to early neutral evaluation, despite positive evaluations of the program by those who participated).

103. For example, the suggestion that the mediator should render a legal opinion; the view of some lawyers that 'running' a mediation was no different from running any other aspect of a case; and comments about some perceived barriers to settlement.

104. The importance of the 'leadership' role of the Court is emphasised by Wayne Brazil in his overview of lessons from the US experience with court-annexed ADR services. See Brazil, W. 'Institutionalizing ADR Programs in Courts' in Sander, F. (ed) Emerging ADR Issues in State and Federal Courts American Bar Association 1991 52 at 71-75.

105. An alternative explanation is that the relatively higher rate of settlement of wrongful dismissal suits is related to this particular area of law. It was suggested by some counsel that the law in this area is relatively well settled, making agreement in mediation more likely. However, other data collected in the course of the evaluation suggests that characteristics which are likely to make a case more or less suitable for early ADR are more often case specific (for example, 'complexity'), rather than related to the particular area of law.

106. The evaluation demonstrates a correlation between counsel who would have preferred to opt out, and cases which did not settle at the Centre.

Appendix A

The evaluation team

Interviewers

Patricia O'Reilly and Irfan Syed, both students at Windsor Law, conducted the majority of the personal interviews with counsel and their clients. They worked using the semi-structured format described above and regularly discussed and compared results with each other and with Julie Macfarlane to ensure as high a degree of consistency as possible.

Database specialists

Trevor Richards and Christine Brown, both doctoral students at the School of Information and Library Science at the University of Western Ontario, were responsible for developing a database for the input and analysis of the questionnaire and interview data. This included the development of codes for the analysis of the 'open-ended' answers to some of the questionnaire and interview questions, the entry of data, regular checks with one another and with Julie Macfarlane to ensure the consistent application of the codes, and the final analysis of data.

Trevor Richards also worked on the design of the questionnaire and interview formats along with Julie Macfarlane. Lisa Feld, members of the Advisory Board and the Centre's Steering Committee gave valuable input to the pilot forms. Trevor was also the projects's internal expert on the Court Administration's Sustain database and developed a programme to analyze information available on Sustain for the purposes of the evaluation.

Administrative assistance

Liv Velasco, of Stitt, Feld, Handy & Houston worked on soliciting comments from lawyers who had chosen to opt out of the ADR Centre; and whose cases had settled before their scheduled session.

Susan Rotondi-Yousef at the Faculty of Law, University of Windsor, provided secretarial assistance. Angie Capaldi at the Faculty provided administrative assistance especially in relation to budget matters.

Evaluation Advisory Board

Members of the Evaluation Advisory Board (see Appendix B) have had important input at a number of stages in the study including the development of the questionnaire and interview formats, the assessment of preliminary findings and the drafting of the final report.

Appendix B

Evaluation Advisory Board

The following served as members of the Project's Advisory Board.

Gary Caplan, Weir and Foulds

Professor Neil Gold, Acting Dean, Faculty of Law, University of Windsor

Christine Hart, Project Director, ADR Centre (Ontario Court) General Division

Sylvia McMechan, Executive Director, The Network for Conflict Resolution

Alan Stitt, Stitt, Feld, Handy & Houston

Mary Thomson, McCarthy Tetrault

